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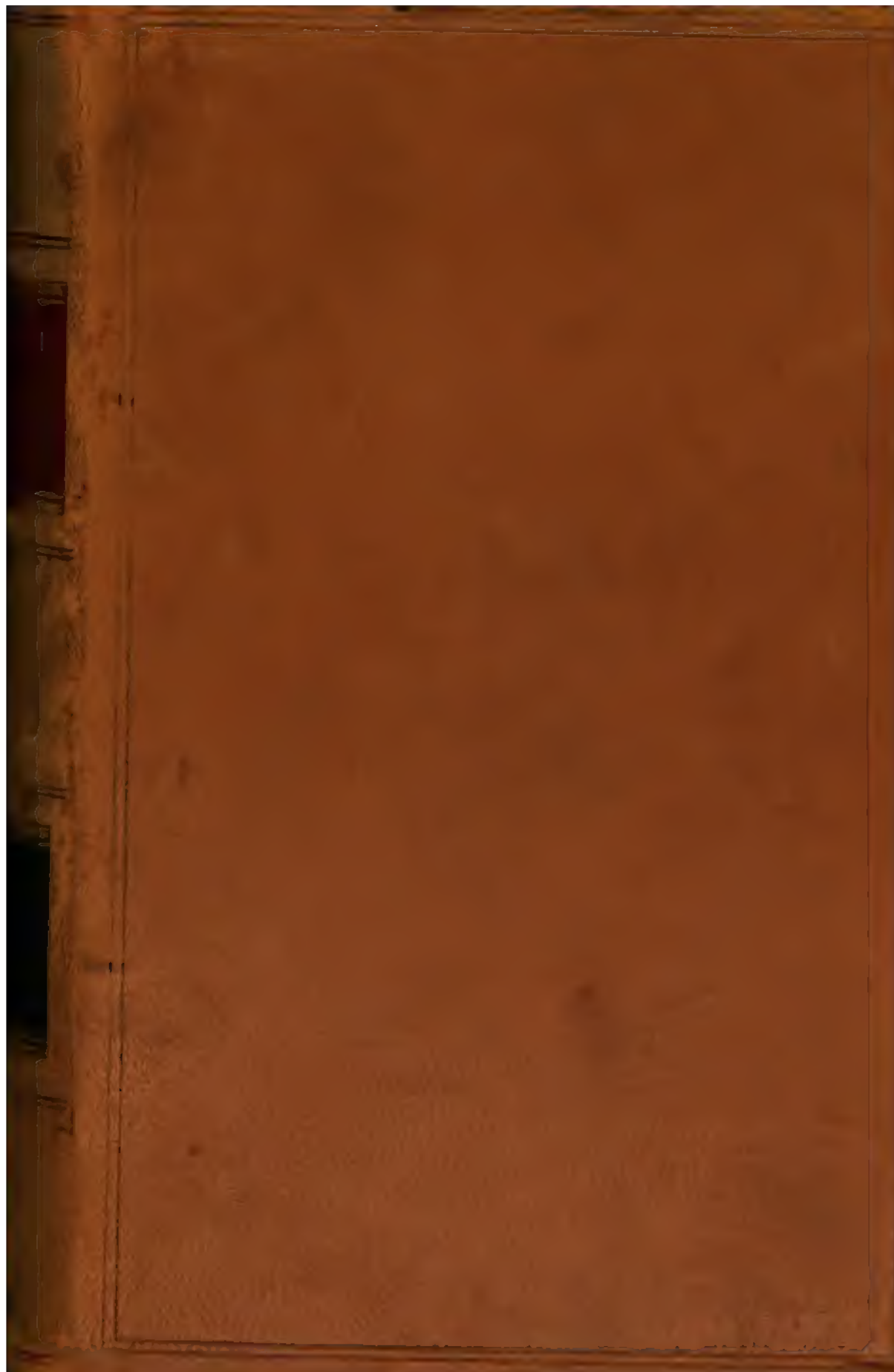
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RAILROAD REPORTS

(Vol. 24 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL,

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

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RAILROAD REPORTS

WEST CHICAGO ST. R. CO. v. TUERK.

(Supreme Court of Illinois, Dec. 18, 1901.)

[61 N. E. Rep. 1087.]

Injury to Passenger in Collision with Vehicle Going in Same Direction as Car—Right to Instruction That Failure to Ring Gong Was Not Negligence—Degree of Care.*

Where a passenger on a street car was injured by a collision between the car and a buggy going in the same direction as the car, defendant in an action by such passenger for the injuries received was not entitled to an instruction that failure to ring the gong was, as a matter of law, not negligence.

Trial—Evidence as to Misconduct of Jury.

During the trial, plaintiff's attorney received an anonymous letter stating that, should plaintiff fail to recover, it would be on account of a certain juror, whom the writer suspected of having been bribed; and after the jury were discharged, it was alleged, a juror asked plaintiff's attorney if he "got that letter," and, on being told that an anonymous letter had been received, said, "That is the one I mean." Plaintiff's attorney swore that he had inquired of the questioning juror as to how the suspected juror voted, and told him and other jurors of the receipt of the letter, and had answered such juror's question as to the receipt of a letter by stating that he had received an anonymous letter warning him against the juror mentioned; and the juror who asked concerning the letter swore that he did not write the same: *held*, there was no evidence of misconduct of the jury.

Appeal from appellate court, First district.

Action by Jessie Tuerk against West Chicago Street Railroad Company. From a judgment in favor of plaintiff, affirmed by the appellate court (90 Ill. App. 105), defendant appeals. Affirmed.

John A. Rose and Louis Boisot, Jr. (W. W. Gurley, of counsel), for appellant.

Francis J. Woolley, for appellee.

RICKS, J. Jessie Tuerk, appellee, recovered a judgment against appellant in the superior court of Cook county for personal injuries received while a passenger on one of its street cars in the city of Chicago. The injury was the result of a collision between the street car and a buggy being driven by one George F. Sweeney on Milwaukee avenue. The car was a grip car, and Sweeney was driving in the same direction that the car was running, and was obliged, because of repairs taking place in the street, and mortar boxes and other things connected therewith obstructing the travel, to drive onto the appellant's tracks, and ahead of the street car, and following the track for some distance. The car, while running at a high rate of speed, overtook, and ran into the buggy, and in the collision the buggy was so thrown around that one of

*See notes at end of case.

the wheels struck appellee, riding in the car, and inflicted the injury complained of. The declaration contained one count, averring that the plaintiff was a passenger on the car owned and operated by appellant, and that the defendant so carelessly and negligently ran and operated the said car that it came in collision with a certain buggy, whereby plaintiff was injured; stating the injury, and averring due care on her part. Sweeney testified that he heard no warning of any kind, and witnesses on each side testified pro and con as to the ringing of a bell. Among other instructions, appellant offered the following: "The uncontradicted evidence in this case is that Sweeney, the driver of the buggy in question, knew that the train of defendant was traveling in the same direction he himself was driving, and it is therefore immaterial whether the bell on the train was or was not sounded." This instruction was refused. Appellant made a motion for a new trial, insisting that the refusal of this instruction was error, and also insisting that a new trial should be granted because of certain developments concerning the jury. The trial lasted about eight days, and during its progress one E. B. Mesirow received an envelope through the mail, marked "Personal," opening which he found a letter addressed to "Mr. F. J. Woolley, 84 La Salle," which he took and delivered personally to appellee's attorney. This letter was as follows: "Dear Sir: Should there be a disagreement in the case of Mrs. Tuerk, it will only be on account of Mr. Korf, a liveryman acting as a juror. I suspect him to be bribed since Friday evening by the R. R. St. Co. Yours, An Honest Man. March 27, '99." This letter was delivered to Mr. Woolley some time before the trial was concluded. He made no mention of it to any one, so far as is shown by the record, until after the verdict was rendered and the jury discharged, when, it was shown by affidavit, one George M. Bidby, who was one of the jurors that tried the cause, approached Mr. Woolley and asked, "Did you get that letter?" Woolley replied, "I did get an anonymous letter," and thereupon Bidby replied, substantially, "That is the one I mean." This matter was also urged as a ground for a new trial, and the conversation between Bidby, the juror, and Woolley, the attorney, was proved by the affidavit of George W. Cutmore, another juror in the case, who overheard it. Joseph B. Mann, who tried the case for the appellant, made affidavit that he had no knowledge of any juror having any improper information imparted to him, or that said Woolley had received the letter mentioned in Cutmore's affidavit, until after the trial was over. Mesirow made affidavit as to the receipt of the letter by him by due course of mail, and delivery of the same to Woolley, and that he had no knowledge of the author of it, and never at any time had any conversation with any member of the jury, or spoke to one, and had no reason to suppose that it was written by any member of the jury, and, further, that he was not acquainted with the jury, or any

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member of it. Bidly, the juror who was alleged to have made the inquiry of Woolley, made an affidavit in which he stated that he did not write the letter, had no knowledge by whom it was written, and that neither Woolley nor any other party upon either side of the case had any communication with him in reference to the case until after the verdict was read in open court. Woolley, appellee's attorney, made an affidavit in which he stated that Dr. Elias B. Mesirov handed him the anonymous letter above referred to on or about the 28th of March, 1899; that he made inquiry of several persons in the witness room, endeavoring to learn who was the author of the letter, without success, and after the verdict had been rendered he inquired of several of the jurors who served on the case as to how Korf had voted, and mentioned to them that he had received an anonymous letter warning him against Korf; that in each instance he was advised that Korf had uniformly voted in favor of appellee; that, among other jurors, he spoke to Bidly regarding this letter, and was also informed by Bidly that Korf had voted always in favor of appellee. He denies that the conversation was as detailed by Juror Cutmore, but states that Bidly asked him if he received a letter, and that he answered that he had received an anonymous letter warning him against Korf. He further states that this conversation was 15 hours after the verdict had been signed and sealed, and a short time after it had been presented to the court and read; that he never at any time prior to the reception of the verdict in court, directly or indirectly, had any conversation with any of the jurors, and had no knowledge as to who was the author of the anonymous letter, and had no reason to suspect that the same was written by any juror. The case was taken to the appellate court for the First district, and there affirmed, and thence comes to this court. The errors relied upon are only two,—the refusal of the instruction above set forth, and the refusal to grant a new trial upon the foregoing affidavits relative to the anonymous letter.

The gist of the refused instruction is that Sweeney knew that appellant's train was traveling in the same direction he was driving, and that therefore it was immaterial whether the bell or gong on the train was sounded or not. The evidence showed that Sweeney had driven several blocks along the same avenue that appellant's train was running; that he would sometimes be behind appellant's train, and sometimes ahead of it; that most of the time he was out of the track; that he was driving rapidly, and sometimes passed the train and sometimes was passed by it; and that shortly before the accident, because of obstructions in the street, he was obliged to drive on the track to pass along the street. There is conflict in the evidence as to whether he was turning in or out of the tracks when struck by the grip car. If Sweeney, instead of appellee, had been the plaintiff in this suit, it may be there was such knowl-

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edge brought home to him that he would have been deemed, in law, to have not exercised ordinary care for his own safety, because of his knowledge of the presence of appellant's train, or its proximity to him, and, under such state of the case, would not have been in a position to insist that the mere failure of appellant to sound the bell was negligence, inasmuch as he might be deemed to know just what the sounding of the bell would inform him, and in such case the authorities cited and relied on by appellant would be applicable. The authorities relied on by appellant are *Railroad Co. v. Coit*, 50 Ill. App. 640; *Williams v. Railroad Co.*, 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 352, 25 Am. St. Rep. 397; *Railroad Co. v. Bell*, 70 Ill. 102; *Theobald v. Railway Co.*, 75 Ill. App. 208; and *Bjork v. Railroad Co.*, 85 Ill. App. 269. In *Railroad Co. v. Coit*, supra, the plaintiff was a passenger on the cable car going east, and alighted at the crossing of Madison street while his car was in motion. He passed around behind the car from which he had alighted, and as he did so a car coming from the west on the track over which he was about to pass struck him and inflicted injury. The negligence relied upon was the failure to ring a bell. Declaration demurred to. Appellate court held that it could not say, as a matter of law, under the state of facts, that it was the duty of the defendant to ring the bell, inasmuch as he was not a passenger on the car that struck him, and the servants in charge of that car had no knowledge that he had been a passenger on any car of the company, or was about to cross the track. The case of *Williams v. Railroad Co.*, supra, was that of a plaintiff who was plowing in his field near a road crossing, and alleged the statutory requirement to ring a bell and sound a whistle 80 rods from the crossing, a failure to do that, and that in consequence of such failure his horses became frightened by the sudden approach of the train and injured him. This court held that he was not upon the highway, and the defendant company owed him no duty, and, speaking of the statute, added: "The persons whose safety and protection are contemplated by this phraseology are those who use the highway, and those who are passengers upon the passing train." The cases of *Theobald v. Railway Co.* and *Bjork v. Railroad Co.*, supra, were both cases where the plaintiffs were injured in crossing a railroad having a number of tracks and trains running on two or more of the tracks; and in each case the court held that by the exercise of ordinary prudence the plaintiffs could and should have seen the trains that wrought the injury in time to avoid the same, and that the failure to ring the bell was not the proximate cause of the injury. It seems to us these cases are not applicable to the questions involved in the suit at bar. In all the cases cited, where the defendant owed any duty at all to the plaintiff, it was only that of ordinary care. 2 Thomp. Neg. § 1376. At the conclusion of that sec-

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tion, speaking of the duty between street railroad companies and persons driving on the street, the author says: "Each party in the use of the highway is bound to exercise ordinary and reasonable care, diligence, and caution, such as the circumstances require, to avoid colliding with the other." Such is the duty that existed between Sweeney and appellant. But appellant owed a much higher duty than that of ordinary care to appellee. "The carrier shall do all that human care, vigilance, and foresight can reasonably do, consistently with the mode of conveyance and the practical operation of the road." *Railway Co. v. Thompson*, 56 Ill. 138; *Railway Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960. Mr. Thompson, in his new work on Negligence (volume 2, § 2100), stating the duty of the carrier to the passenger, says: "Not ordinary, but extraordinary, diligence is required as to passengers; and the company is responsible for the utmost care and watchfulness, and answerable for the smallest negligence."

The duty, then, of appellant, is not to be measured by the relative rights of Sweeney and appellant, but by the rights arising from the relation existing between appellant and appellee. There is no pretense that appellee was not using all the care she could use for her own safety, and the question that was presented to the jury was, did appellant use all the care for the safety of appellee that it was its duty to use under the circumstances of the case? While it may be that appellant could say to Sweeney, "You have no right to complain. You knew our train was running on this track at that particular time, and near to you; and ordinary care required that you use reasonable effort to avoid injury, and that reasonable effort would have required you to have driven off our track, or, when off, to have remained off until we passed with our train." Yet appellee had a right to demand and rely upon appellant exercising every act that human care, vigilance, and foresight could reasonably do, consistent with the operation of its road, to avoid injury to her; and we are unable to say that the court should have instructed the jury that it was not their duty to ring the bell, or to do any other and every other act that was calculated to avoid this injury. This is especially so in view of the fact that the train was running at full speed, and that it is not pretended that appellant's servants in charge of the train did not know that Sweeney was on the track, or that they did not see him. The declaration contained a general charge of negligence in the running and operating the train, and it was a question of fact for the jury to determine whether, under all the facts and circumstances, appellant was guilty of such negligence as made it liable; but appellant insisted that the court ought to instruct the jury, as a matter of law, that the failure to ring the bell was immaterial, which meant the same as to say that the failure to ring the bell was not negligence. This we think the court was not warranted

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in doing, under the evidence in the case, and that he properly refused the instruction asked.

The next contention is that this verdict should have been set aside, and the case now reversed, upon what appellant terms the "misconduct of the jury." The evidence in this case upon that question fails to show any misconduct on the part of the jury. That question was presented to the court by the affidavits, the substance of which is set out in this opinion; and the trial court must have found that there was no sufficient evidence before it to show that any juror had anything to do with that letter, nor that it did or could in any way have influenced the jury, or any member of it, in its consideration of or vote upon the case. The appellate court affirmed this judgment, and we regard the question as to what irregularity or impropriety, if any, there was that crept into or emanated from the jury, as a question of fact. The appellate court affirmed the judgment of the trial court, and thereby affirmed its action in overruling the motion for a new trial. Having affirmed it, the appellate court was not required to make a special finding of facts in its judgment, and, without looking to its opinion, the presumption of law would be that it found the facts in all material respects the same as the trial court. The strongest inference that could be possibly drawn from these affidavits on this motion for a new trial is, that the juror Biddy had a suspicion that the juror Korf had been tampered with by appellant or somebody in its interest; but there is no evidence tending to show that he communicated that suspicion to any other juror, or that it in any way affected the verdict; nor does it show, or tend to show, that any juror was in fact approached by anybody, or that the juror Biddy had any ground upon which to base any such suspicion. He swore that he did not write the anonymous letter, had no knowledge of it, and that no person communicated with him concerning the case until after the verdict was read in open court; and, treating the question of fact as an open one for our consideration, we are unable to say from the affidavits in the record that there was any sufficient evidence to warrant the conclusion that any of the jurors had anything to do with this letter. While it is the duty of the trial court to jealously watch the jury and to carefully scrutinize all its acts, and whenever it appears that any influence was used with the jury, or any member of it, that was calculated to prejudice him or them for or against the party in whose interest it was made, to set aside a verdict that might by any reasonable possibility be the result of such improper influence, the courts must not interfere with verdicts upon the mere suspicion that it is possible that some member of the jury might have entertained a suspicion touching some other member of the jury.

After a careful examination of the case, we are satisfied with the judgment of the appellate court, and it is affirmed. Judgment affirmed.

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I. NOT LIABLE FOR THE ACT OF GOD OR THE PUBLIC ENEMY.

A. IN GENERAL.

Public carriers of passengers, equally with common carriers of goods, come within the application of the general rule that when the law imposes a duty upon any person, the performance shall be excused if rendered impossible, without any default on his part, by the act of God or the public enemy.

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B. ACT OF GOD.

As in other branches of the law, the courts have not always been particular to draw the distinction which should, according to some authorities, be observed between acts of God and inevitable accidents, but have used the expressions interchangeably. For example, it has been said that "a company would not be guilty of such culpable negligence as to make it liable in damages if it failed to provide against such extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad. In such case the injury cannot be held to be attributable to any fault or negligence of the company; it results from inevitable accident,—vis major,—the act of God." *Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

Unquestionably, no liability attaches to carriers of passengers for accidents caused by the occurrences which are designated by these terms. If an accident results, without any negligence on the part of the carrier, from extraordinary and unprecedented weather, no liability attaches. *Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. 411, 37 Am. & Eng. R. Cas. 135; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325, 37 Am. & Eng. R. Cas. 128; *Connelly v. Manhattan Ry. Co.*, 68 Hun (N. Y.) 456, 39 N. Y. S. R. 561, 15 N. Y. Supp. 176.

A carrier of passengers by railroad is not responsible for accidents resulting from extraordinary and unprecedented floods, the consequences of which could not have been avoided by due care and diligence on the part of the carrier. *Ellet v. St. Louis, etc., R. Co.*, 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; *Illinois Cent. R. Co. v. Kuhn* (Tenn. 1901), 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324; *San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App. 1900), 55 S. W. 517; *Norfolk, etc., R. Co. v. Marshall*, 90 Va. 836, 20 S. E. Rep. 823.

Thus, where an accident resulted from a washout, caused, as witnesses testified, by "the hardest rain at and about the locality of the accident which any of the witnesses had ever seen in that part of the county," and it appeared that the section boss had passed over the track but a short time before the accident and found it safe, it was held that the court should have charged the jury that the company was not responsible unless those in charge of the train knew of the washout. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

The derailment of a train by a snow slide, proceeding from a cause over which the company had no control, and under circumstances which it was bound neither to anticipate nor to expect, and against which, under the circumstances, it was not bound to make provision, has been declared to be an inevitable accident, and it has been held that the carrier could not be held responsible for injuries resulting therefrom to passengers. *Denver, etc., R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518.

But a landslide or washout, which is caused by a fall of rain which is not of unusual violence, is not properly an act of God, but an event against which it is the duty of the carrier to guard. *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, reversing 5 Mackey (D. C.) 356; *Texas, etc., R. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698. And, of course, in order to relieve the carrier from liability for the consequences of an act of God, the extraordinary occurrence must alone have been sufficient to produce the given result, without any concurring negligence on the part of the carrier. *Illinois Cent. R. Co. v. Kuhn* (Tenn. 1901), 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324.

Thus where a freight train, standing on a side track, was driven partly upon the main track by a violent storm and was run into by a passenger train, injuring plaintiff, it was held that, since the pas-

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senger train could have been flagged by an employee of defendant, who discovered the dangerous position of the freight cars, had he exercised proper diligence, the defense that the accident resulted from the act of God could not avail defendant, assuming that the storm was of a character properly to be denominated an act of God. *Gulf, etc., R. Co. v. Bell* (Tex. Civ. App. 1900), 58 S. W. 614.

The nonperformance of a contract of transportation is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal or precise performance of it impossible. Defendant, a public carrier of passengers, contracted to carry plaintiff from one place to another, agreeing to carry him over the last part of the specified route by a particular steamer. The steamer named was wrecked by the act of God. It was held that, notwithstanding the loss or wrecking of the steamer, it was the duty of defendant to exercise all due diligence in providing another vessel for the carriage of plaintiff, and that, for a failure so to do, defendant was liable in damages. *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

C. ACT OF THE PUBLIC ENEMY.

If a railroad bridge crossing a river is burned by the public enemy a few hours before the passing of a train, and in consequence thereof the train is precipitated into the river, without any negligence on the part of the railroad or its employees, there can be no recovery for injuries sustained in the accident by a passenger. *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382.

II. NOT LIABLE AS INSURERS—CARRIERS OF PASSENGERS AND OF GOODS DISTINGUISHED.

In a few early cases, both in England and the United States, it is assumed that the common-law liability of carriers of passengers is the same as that of carriers of goods.

In the case of *White v. Bolten*, Peake 113, which was decided in 1791 and seems to be the first reported case involving the question of the liability of a carrier for injuries to passengers, Lord Kenyon said that proprietors of mail coaches, when they carry passengers, "are bound to carry them safely and properly."

And in the case of *Bremner v. Williams*, 1 Car. & P. 414, decided in 1824, Rest, C. J., said he considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." Another early English case which goes far to support the view that the liability of carriers of passengers and of carriers of goods is the same, is that of *Sharp v. Grey*, 9 Bing. 457, where the axle-tree of a coach was broken and the plaintiff injured. There the axle was an iron bar inclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement that the defect could not have been seen on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of the different judges would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. Gaselee, J., held that "the burden lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J., said: "The chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axle-tree. If so, when the coach started it was not roadworthy, and the defend-

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ant is liable for the consequence, upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy." And Alderson, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The jury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy." In the New York case of *Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, 3 Am. Law Reg. (N. S.) 498, the accident, by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide roadworthy vehicles, and that the defendant was liable for the plaintiff's injuries caused by a crack in the axle, although the defect could not have been discovered by any practicable mode of examination. The only authority cited to sustain the decision was the above-cited English case of *Sharp v. Grey*, 9 Bing. 457. But in the later English case of *Readhead v. Midland R. Co.*, L. R., 2 Q. B. 412, L. R., 4 Q. B. 379, 36 L. J. Q. B. 181, 38 L. J. Q. B. 169, 5 Eng. Rul. Cas. 436, Mr. Justice Smith, writing the opinion of the court when the case came before the Exchequer Chamber, in alluding to and dissenting from the New York case, points out that no authority for the broad doctrine therein laid down is to be found in *Sharp v. Grey*. Accepting this view, it appears that the case of *Alden v. New York Cent. R. Co.* has no foundation of authority whatever to rest on. And that the case is no longer considered authority, is a proposition in regard to which there can now be no question. In the later New York case of *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705, Earle, Commissioner, said of the case that it "was a departure from every prior decision and authority to be found in the books of this country or England, and, so far as I can learn, has never been followed anywhere out of this state. It was in conflict with the previous case, in the same court, of *Hegeman v. Western R. Co.*, 13 N. Y. 9, 64 Am. Dec. 517." And in the still later case of *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, aff'g 65 Barb. (N. Y.) 32, Andrews, J., after holding that carriers of passengers are not insurers, said: "Some remarks, which seem adverse to this view, were made by the learned judge who delivered the opinion in *Alden v. New York, etc., Co.*, 26 N. Y. 102, 82 Am. Dec. 401, but the subsequent cases show that it was not the intention of the court to depart from the established doctrine upon the subject." In *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581, Agnew, J., in delivering the opinion of the court said: "*Alden v. N. Y. Central Railroad Co.*, 26 N. Y. 102, holding that a carrier is bound absolutely to provide a safe vehicle, irrespective of any question of negligence, is not in accord with the American cases generally, or the modern English decisions."

In the California case of *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135, after citing the cases of *Miles v. Johnson*, 1 McCord (S. Car.) 157, *Cohen v. Hume*, 1 McCord (S. Car.) 439, *Rutherford v. McGowen*, 1 Nott & M. (S. Car.) 17, and *Fisher v. Clisbee*, 12 Ill. 344, to the proposition that "the law regards ferry-men as common carriers, and has imposed upon them the same duties and liabilities," the court said: "The principle deduced from these authorities is that as soon as the ferry-man signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring, except by act of God or the public enemy."

But, by the common law, there is a marked distinction between the liability of common carriers of goods and carriers of passengers. For the obvious reason that a great difference exists between the inherent nature of persons and of goods, the passengers being capa-

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ble, in a measure, of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods, who have entrusted them to others, cannot do (Hubbard, J., in *Ingalls v. Bills*, 9 Met. (Mass.) 355; and see *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332), carriers of passengers are not, like carriers of goods, insurers against everything but the acts of God and the public enemies.

United States—*Boyce v. Anderson*, 2 Pet. (U. S.) 150, 7 L. Ed. 379; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. Ed. 115; *Washington, etc., R. Co. v. Varnell*, 98 U. S. 480, 25 L. Ed. 233; *Dunlap v. Steamboat Reliance*, 2 Fed. 249; *Pendleton v. Kinsley*, 3 Clif. (U. S.) 416, Fed. Cas. No. 10,922.

California.—*Fairchild v. Stage Coach Co.*, 13 Cal. 599; *Nagle v. California, etc., R. Co.*, 88 Cal. 86, 25 Pac. 1106.

Connecticut.—*Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319.

Georgia.—*Central of Georgia Ry. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Illinois.—*Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483; *Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578.

Kentucky.—*Louisville, etc., R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591.

Maine.—*Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812.

Maryland.—*Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

Massachusetts.—*Ingalls v. Bills*, 9 Met. (Mass.) 1, 43 Am. Dec. 355; *Shattuck v. Rand*, 142 Mass. 83, 7 N. E. 43.

Michigan.—*Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103, 72 N. W. 1112; *Wormsdorf v. Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

Missouri.—*O'Connell v. St. Louis, etc., R. Co.*, 106 Mo. 482, 17 S. W. 494; *Gilson v. Jackson County House Ry. Co.*, 76 Mo. 282, 12 Am. & Eng. R. Cas. 132; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399.

Montana.—*Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; *Foley v. Brunswick Traction Co.*, 50 Atl. 340, 23 Am. & Eng. R. Cas., N. S., 621.

New Jersey.—*New Jersey Traction Co. v. Gardner*, 58 N. J. L. 176, 31 Atl. 893.

New York.—*Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488, 18 N. E. 859, 37 Am. & Eng. R. Cas. 150, 2 L. R. A. 252; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, aff'g 65 Barb. (N. Y.) 32; *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258.

Pennsylvania.—*Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Laing v. Colder*, 8 Pa. St. 482, 49 Am. Dec. 533.

South Carolina.—*Renneker v. South Carolina R. Co.*, 20 S. Car. 218, 18 Am. & Eng. R. Cas. 149.

Texas.—*International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829; *Gulf, etc., R. Co. v. Killebrew* (Tex. 1892), 20 S. W. 182, 20 S. W. 1005; *Conwill v. Gulf, etc., R. Co.* (Tex. 1892), 19 S. W. 1017; *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *San Antonio, etc., R. Co. v. Lynch* (Tex. Civ. App. 1900), 55 S. W. 517; *Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846.

Vermont.—*Hadley v. Cross*, 34 Vt. 588, 80 Am. Dec. 699; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424.

Virginia.—*Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

Consequently instructions which, in effect, hold carriers of pas-

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sengers liable as insurers against injuries to passengers are erroneous. *Texas & P. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

An instruction to the effect that a carrier of passengers is liable for an injury from a defect in a vehicle unless he has used the "greatest possible care and diligence that was necessary" is erroneous for the reason that it requires the carrier to be gifted with prescience and to know what no human skill and foresight would reveal, and, in effect, makes the carrier an insurer of the life and limb of the passenger. *Gilson v. Jackson County Horse R. Co.*, 76 Mo. 282, 12 Am. & Eng. R. Cas. 132.

And, on the same ground, a charge which, in effect, stated that it was the duty of the defendant railroad company, as a carrier of passengers, to carry the plaintiff safely has been held to be erroneous. *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324.

Similarly, a charge requiring the use of reasonable and proper care and prudence by the employees of a defendant railroad company as to carry with safety those who ride on its cars, has been regarded as not being "plain and free from cavil." *Dallas, etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925.

In a case in which the trial court had charged the jury that while railroad companies are not to be regarded as the insurers of the safety of their passengers, still they are required to use the utmost care and provide for the safety of their passengers, and the failure to use such care and caution is negligence, the reviewing court, in holding that the charge was inconsistent and erroneous, said that it was not the duty of the railway company to provide for the safety of its passengers, but to use the highest degree of care to that end. *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58. In *International, etc., R. Co. v. Underwood*, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240, the trial court charged the jury as follows: "It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable." While the judgment below was reversed largely upon other grounds, in commenting upon this charge, *Stayton, A. J.*, in delivering the opinion of the court, said: "The judge who tried this cause certainly did not intend to inform the jury that a carrier of passengers must use such care as will actually result in the safe carriage of passengers, and that the exercise of a degree of care which does not accomplish that result was negligence for which the carrier would be liable; for this would be to make the carrier an insurer. The charge is susceptible of such a construction, and may have been so understood by the jury; it is likely, however, in view of the facts, that the jury were not misled by this, when considered in connection with the one which followed it."

But it has been held that a charge that an inspection of cars and appliances must be sufficient to insure the safety of passengers against accident is not capable of the construction that the word "insure" was meant in the limited sense that the company was an insurer; the court further explaining that the company must exercise such duty of inspection as in the judgment of those who understood the subject was sufficient to insure, etc. *Leonard v. Brooklyn Heights R. Co.*, 67 N. Y. Supp. 985.

III. LIABILITY BASED UPON NEGLIGENCE.

In the absence of some statute otherwise providing, the liability of carriers of passengers depends solely upon negligence; no responsibility attaches to a passenger carrier for any injuries to passengers except those which are the proximate result of the carrier's negligence.

England.—*Park, J.*, in *Crofts v. Waterhouse*, 3 Bing. 321.

Georgia.—*Murphy v. Atlanta, etc., R. Co.*, 89 Ga. 832, 15 S. E. 774;

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Atchison, etc., R. Co. *v.* Flinn, 24 Kan. 627, 1 Am. & Eng. R. Cas. 240.

Maryland.—Baltimore City R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; Baltimore, etc., R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578; Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Massachusetts.—Ingalls *v.* Bills, 9 Met. (Mass.) 1, 43 Am. Dec. 355.

Michigan.—Moore *v.* Saginaw, etc., R. Co., 115 Mich. 103, 72 N. W. 1112; Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453; Mitchell *v.* Chicago, etc., R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Missouri.—Olsen *v.* Citizens' R. Co., 152 Mo. 426, 54 S. W. 470; Hite *v.* Metropolitan, etc., R. Co., 130 Mo. 132, 51 Am. St. Rep. 555; Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382.

New Jersey.—Foley *v.* Brunswick Traction Co. (N. J. 1901), 50 Atl. 340, 23 Am. & Eng. R. Cas., N. S., 621.

New York.—Loudoun *v.* Eighth Avenue R. Co., 162 N. Y. 380, 56 N. E. 988, reversing 44 N. Y. Supp. 742, 16 N. Y. App. Div. 152; Palmer *v.* Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252; Kelly *v.* New York, etc., R. Co., 109 N. Y. 44, 15 N. E. 879; Loftus *v.* Union Ferry Co. of Brooklyn, 84 N. Y. 455, 38 Am. Rep. 533; Dougan *v.* Champlain Transp. Co., 56 N. Y. 1; McPadden *v.* New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705, criticising Alden *v.* New York Cent. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534. And see Camden, etc., R. Co. *v.* Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

Pennsylvania.—Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 306; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581; Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. St. 512, 91 Am. Dec. 224.

South Carolina.—Wade *v.* Columbia Electric St. R. Co., 51 S. Car. 296, 29 S. E. 233, 64 Am. St. Rep. 676.

Virginia.—Reynolds *v.* Richmond, etc., R. Co., 92 Va. 400, 23 S. E. 770.

This nonliability of the carriers for purely accidental injuries is very well illustrated by the case of an injury to a passenger resulting from the act of the conductor who, in removing a drunken man from a street car, jostled another drunken man, who was standing in front of plaintiff, and threw him upon her. As it did not appear that there was any negligence in the manner of expelling the drunken man, or otherwise, it was held that defendant was not liable. Spade *v.* Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. Rep. 298, 43 L. R. A. 832.

In another case, plaintiff had been injured by the falling upon him, from a rack above his seat in a passenger car, of a wringer which was, to some extent, wrapped in brown paper so that its apparent character, both as to bulk and weight, was not such as reasonably to attract the attention of the trainmen. Furthermore, the parcel, even though its real character was noticed by the trainmen, was not so apparently placed in a dangerous position as to demand from them an order for its removal from the rack. It was held that there was no negligence on the part of the trainmen, and that there could be no recovery. Morris *v.* New York Cent., etc., R. Co., 106 N. Y. 678, 13 N. E. 455, 11 N. Y. St. Rep. 204.

The operator of a passenger elevator, in attempting to sit down in the usual way upon a stool provided for that purpose, lost his balance, in consequence of the removal of the stool from its accustomed place without his knowledge, and involuntarily clutched at the lever for support, thus starting the elevator and injuring plaintiff. It was held that, under the circumstances, there was no evidence of negligence and that there could be no recovery. Gibson *v.* International Trust Co., 58 N. E. 278, 177 Mass. 100.

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In a case which was before the New York court of appeals several times, and which is usually referred to by text writers as illustrating the class of accident for which no liability attaches to the carrier, the facts were as follows: Just as defendant's steamboat was leaving the dock, a man rushed through the crowd of people on board and jumped into the water. The cry of "Man overboard!" was raised and, immediately, there was a great rush of passengers to the side of the boat whence the cry proceeded, crowding several persons, including plaintiff, through the gate-way, which had not been closed, and overboard into the water. It was held that, since the accident was of such a nature that its occurrence could not have reasonably been anticipated, it was not negligence to start the boat until the gate was closed and securely fastened across the gangway. In delivering the opinion of the court, Peckham, J., said: "To say that the boat should not have been allowed to move a foot from the dock until this gate had been thus securely fastened, and the rail and stanchions placed in position, is to decide the matter in view of the facts which subsequently occurred, and not from the circumstances existing prior thereto. It was an accident which could not, as I think, have been reasonably anticipated. The attempt of a belated man to jump from the boat to the wharf immediately after the starting of the boat, his failure to reach the dock, and his consequent falling in the water, the cry of 'Man overboard!' the instantaneous rush of a crowd of ordinary passengers towards the side of the boat whence the cry proceeded, and the shoving of the plaintiff overboard, altogether form such an extraordinary, and therefore unheard-of, combination of circumstances, that the failure to foresee their possibility and to guard against their happening cannot, in any fair or proper view of the subject, be called negligence." *Cleveland v. New Jersey Steamboat Co.*, 125 N. Y. 299, 26 N. E. 327.

Where a woman passenger on a street car was severely burned in consequence of the negligent act of another passenger in throwing a lighted match on her dress, it was held that there could be no recovery against the street railway company. *Sullivan v. Jefferson Avenue Ry. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

Plaintiff got on defendant's street car while it was standing partly on a curve. Before she could take her seat the car was started and the motion of the car in going around the curve threw her down and injured her. There was no evidence in the case to show that excessive speed was used or that there was other negligence in starting and running the car around the curve. While recognizing it to be a very close case, the court was of the opinion that it was error to submit the question of defendant's negligence to the jury, and held that there should be a new trial. "This case falls clearly within the rule that where an accident is not the reasonable, natural, and probable result of the situation, which ought to have been foreseen by the defendant in the exercise of the degree of care exacted from a carrier of passengers, no liability follows." *Ayers v. Rochester Ry. Co.*, 156 N. Y. 104, 50 N. E. 960.

IV. LIABILITY FOR NEGLIGENCE.

Carriers of passengers are, of course, liable for negligence. In the case of *White v. Boulton*, Peake 113, which, as has been said, seems to be the first reported case brought against a carrier for the recovery of damages for an injury to a passenger, it was contended that there could be no recovery for the reason that the coach upon which the plaintiff had taken passage was a mail-coach and that, therefore, the plaintiff, as owner was primarily in the public service. But Lord Kenyon disposed of the contention by saying that the idea was "too absurd to enter the head of any man." While travelers must take the risks necessarily incident to the mode of travel which they select, those risks, in the legal sense, are only such as are not due to the carrier's negligence. See *Washington, etc., R. Co.*

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v. Varnell, 98 U. S. 480, 25 L. Ed. 233; *Pendleton v. Kinsley*, 3 Clif. (U. S.) 416, Fed. Cas. No. 10,922.

V. WHAT CONSTITUTES NEGLIGENCE.

Negligence, in the ordinary legal sense, imports the absence or want of such care as the law exacts in the performance of any given undertaking. See 1 Shear. & Redf. on Negl., sec. 3; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Cochran, J.*, in *Baltimore, etc., R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 90 Am. Dec. 49.

Accordingly, it may, for the purposes of this subject, be said that a failure to exercise the degree of care and diligence due from carriers of passengers to their passengers is negligence on the part of a passenger carrier.

United States.—*New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627; *The New World v. King*, 16 How. (U. S.) 469, 14 L. Ed. 1019.

Indiana.—*Citizens' St. R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014; *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466.

Kentucky.—*Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455.

Maryland.—*Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

Minnesota.—*Reem v. St. Paul City R. Co.*, 77 Minn. 503, 80 N. W. 638.

New Jersey.—*Hansen v. North Jersey St. R. Co.* (N. J. 1900), 46 Atl. 718; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 283, 21 Atl. 1052.

New York.—*Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418.

Ohio.—*Cleveland, etc., R. Co. v. Manson*, 30 Ohio St. 451.

Pennsylvania.—*Holmes v. Alleghany Traction Co.*, 153 Pa. 152, 25 Atl. 640.

Texas.—*Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68.

West Virginia.—*Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393. But compare *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. Ry. Rep. 59; *Galloway v. Chicago, etc., R. Co.*, 87 Iowa 458, 54 N. W. 447, 58 Am. & Eng. R. Cas. 245; *Omaha St. R. Co. v. Craig*, 39 Neb. 601, 58 N. W. 209, 58 Am. & Eng. R. Cas. 208. In *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434, the defendant requested the following instruction: "The court further instructs you that by 'negligence,' when used in these instructions, is meant either the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances." In sustaining the action of the trial court in refusing the instruction, *Elliott, C. J.*, in delivering the opinion of the court, said: "This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character, the omission to exercise the highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care."

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VI. DEGREE OF CARE REQUIRED.

A. IN GENERAL.

Since, then, negligence on the part of carriers of passengers consists of the omission to exercise the care which the law exacts of them, it becomes important to define the degree of care required, the omission of which will make passenger carriers responsible for consequential injuries to the persons of passengers.

B. MORE THAN ORDINARY CARE.

While public carriers of passengers are not, like common carriers of goods, liable as insurers, the degree of care for the safety of passengers which the law imposes upon them is much higher than the ordinary care required of men who sustain to each other nothing more than the common relations of life, which one citizen, merely as such, sustains to another. It is true that expressions are found, in a few cases, which leave it to be inferred that the courts were of the opinion that carriers of passengers are only bound to exercise ordinary skill and care to secure the safety of passengers. For example, in *Boyce v. Anderson*, 2 Pet. (U. S.) 150, 7 L. Ed. 379, the court seems to have been of the opinion that passenger carriers are "liable only for ordinary neglect." But this is not the law. Because the safety and even the lives of passengers are necessarily intrusted, in a great degree, to the care of the carriers who transport them, the law deems it reasonable that the carrier should be bound to exercise a very high degree of care.

As was said in *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537, 90 Am. Dec. 399, "Public policy and safety require that they [carriers of passengers] should be held to the greatest possible care and diligence, and that the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents."

In *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229, it was said that upon grounds of public policy the carrier of passengers is bound to exercise the highest degree of care and diligence. "To his diligence and fidelity are intrusted the lives and safety of large numbers of human beings. He assumes the trust voluntarily, and for it receives a sufficient compensation; and we think it very apparent that in no case of the bailment of goods is there so great and imperative a demand for the utmost skill and diligence as from the carrier of passengers. Especially is this true when the passengers are carried upon railroads by steam, for then, in consequence of the greater speed, the hazards to life and limb are largely increased." And the authorities are unanimous in exacting of passenger carriers a very high degree of care for the safety of their passengers.

California.—*Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. 320, 4 Am. & Eng. R. Cas., N. S., 182, 32 L. R. A. 193.

Florida.—*Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 11 So. 506, 52 Am. & Eng. R. Cas. 409, 32 Am. St. Rep. 17, 16 L. R. A. 631.

Georgia.—*Gardner v. Waycross, etc., R. Co.*, 97 Ga. 482, 54 Am. St. Rep. 435.

Illinois.—*Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239.

Indiana.—*Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 57 Am. Rep. 120; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234, 49 Am. Rep. 168.

Iowa.—*Kellow v. Central Iowa R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858; *Sales v. Western Stage Co.*, 4 Iowa 546.

Kansas.—*Southern, etc., Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45.

Kentucky.—*Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455.

Massachusetts.—*Dodge v. Boston, etc., S. S. Co.*, 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83.

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Missouri.—*Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, 97 Am. Dec. 402; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537, 90 Am. Dec. 399.

Nebraska.—*East Omaha St. R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas., N. S., 300.

New Jersey.—*Hansen v. North Jersey St. R. Co.* (N. J. 1900), 46 Atl. 718; *Scott v. Bergen County Traction Co.* (N. J.), 43 Atl. 1060, 4 Chic. L. J. W'kly 379; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 40 Atl. 645, 68 Am. St. Rep. 723.

New York.—*Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629, aff'g 46 Hun (N. Y.) 486; *McPadden v. New York Cent. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705, reversing 47 Barb. (N. Y.) 247.

North Carolina.—*Lambeth v. North Carolina R. Co.*, 66 N. Car. 494, 8 Am. Rep. 508.

Pennsylvania.—*Smedley v. Hestonville, etc., R. Co.*, 184 Pa. St. 620, 42 W. N. C. 169, 39 Atl. 544, 9 Am. & Eng. R. Cas., N. S., 649; *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

Texas.—*Texas Cent. R. Co. v. Stewart*, 1 Tex. Civ. App. 642, 20 S. W. 962.

Virginia.—*Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

West Virginia.—*Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393.

Wisconsin.—*Davis v. Chicago, etc., R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 4 Am. & Eng. R. Cas., N. S., 622, 33 L. R. A. 654.

Hence a jury is very properly instructed that a carrier of passengers is bound to exercise more than ordinary care and diligence. *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 58 Am. & Eng. R. Cas. 337.

It has been held not to be erroneous to instruct a jury, in an action against a surface railway company, that defendant "was required to exercise, through its servants, a very high degree of care and skill in the operation of its cars." *Koehne v. New York, etc., R. Co.*, 52 N. Y. Supp. 1088, aff'd in 165 N. Y. 603, 58 N. E. 1089. On the other hand, instructions which exact of carriers of passengers nothing more than ordinary care do not require a sufficiently high degree of care and are clearly erroneous. *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; *Brown v. Louisville R. Co.*, 21 Ky. L. Rep. 995, 53 S. W. 1041; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316; *Payne v. Spokane St. R. Co.*, 15 Wash. 522, 46 Pac. 1054. And this has very properly been held to be true of instructions which require merely reasonable care. Thus, an instruction holding a carrier of passengers to the "exercise of reasonable skill and diligence" only has been held to be erroneous (*Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 44 Am. & Eng. R. Cas. 322, 13 S. W. 1044, 22 Am. St. Rep. 781), as has also an instruction enunciating the doctrine that a carrier of passengers is not liable for an injury caused by an accident resulting from a cause which could not have been foreseen or prevented by the exercise of reasonable care, vigilance, and foresight. *Moore v. Des Moines, etc., R. Co.*, 69 Iowa 491, 30 N. W. 51, 27 Am. & Eng. R. Cas. 315.

A request for an instruction which, in effect, defined the care exacted of carriers of passengers to be the degree of care exercised by reasonably cautious persons engaged in like service under like circumstances was held to have been properly refused. *Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310.

There is, however an early Vermont case which tends to support the view that the expressions "due care" or "reasonable care" sufficiently define the care required. *Hadley v. Cross*, 34 Vt. 588, 80 Am. Dec. 699. In this case, Poland, Ch. J., in delivering the opinion of the court, said: "Some of the books and cases say the carrier of passen-

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gers is only liable for the want of due care, or reasonable care; others say they are bound to extraordinary care, and the highest diligence, to ensure the safety and security of their passengers. But we apprehend there is no real difference in the meaning of these terms as applied to the subject. In any business involving the personal safety and lives of others, what is due care, reasonable diligence? Clearly nothing less than the most watchful care and the most active diligence; anything short of this is negligence and carelessness, and would furnish clear ground of liability if an injury was thereby sustained."

And in *Smith v. Georgia Pac. Ry. Co.*, 88 Ala. 540, 7 So. 119, 41 Am. & Eng. R. Cas. 143, 7 L. R. A. 323, 16 Am. St. Rep. 63, the expression "reasonable care" was used. In a later case it was said that the expression is to be taken to have been employed to designate the high degree of care imposed by law as being reasonable in view of the relation existing between the carrier and his passenger. *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

But it is apprehended that the expression "reasonable care," unexplained, will usually be understood by the average mind to be practically synonymous with "ordinary care." And it certainly is open to the objection that it is not sufficiently explicit to convey to the minds of the average jury an accurate conception of the requirement of the law. In *Moreland v. Boston, etc., R. Co.*, 141 Mass. 31, 6 N. E. 225, in holding that a request for an instruction was properly refused, the court said that, if the meaning of the instruction requested was that the defendant was bound to use reasonable care to prevent injuries that could be prevented, it was immaterial, as it gave no rule of reasonable care.

And it has very properly been held that an instruction that, "In this case the defendant, being a carrier of passengers for hire, the law imposes upon it a reasonable degree of care and foresight to prevent injuries to persons lawfully traveling in its cars," is defective in not defining what, under the law, constitutes a reasonable degree of care. *Dickert v. Salt Lake City R. Co.* (Utah, 1899), 59 Pac. 95.

C. CARE REQUIRED NOT DEPENDENT ON PECUNIARY ABILITY OF CARRIER.

Obviously, the standard of care and diligence for a particular carrier cannot be made to depend upon his pecuniary condition or the amount of his earnings. *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280.

For this reason a charge that "defendants must use such degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business," has been held to be erroneous. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229. In so holding the court said: "This might, and probably would, be understood to require of the defendants all practicable care to the extent of their means, which would make the ability of the corporation the measure of the care and diligence required, and that obviously is not the true test—and judging from other parts of the instructions it was not so intended—still the terms used are so explicit that there is reason to fear that the jury may have been misled, and induced to require as a standard a higher degree of care and diligence than the law actually demands. It would be quite likely to be so, if it appeared that the corporation was receiving a large income from this business beyond the expenses. If, on the other hand, it appeared that the receipts did not equal the running expenses, the jury might feel at liberty to exact a lower degree of care and diligence. * * * * The objection to the passage in question now before us is, the danger that the jury may have understood that the defendants were bound to use all practicable care and skill to the extent of their means; and as we do not know that their means were not understood to be ample, we cannot be sure that the jury were not misled."

Notes

D. STATEMENTS OF THE RULE.

1. In General.

The degree of care which carriers of passengers are required to observe for the protection of their passengers is variously expressed in the books.

2. Statements Requiring "Extraordinary," "Great," "Extreme" or "Strict" Care.

The courts have sometimes said, and have sustained charges to the effect, that carriers of passengers are bound to exercise "strict diligence" (Alabama, etc., *R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65), "great care and caution" (Clark *v. Eighth Avenue R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495), "extreme care and diligence" (Sloane *v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. 320, 4 Am. & Eng. R. Cas., N. S., 182, 32 L. R. A. 193), "extraordinary care" (Denver Tramway Co. *v. Reid*, 4 Colo. App. 53, 35 Pac. 269; Toledo, etc., *R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; Dahlberg *v. Minneapolis St. R. Co.*, 32 Minn. 404, 21 N. W. 545, 18 Am. & Eng. R. Cas. 202, 50 Am. Rep. 585), "extraordinary care and caution" (Raymond *v. Burlington, etc., R. Co.*, 65 Iowa 152, 21 N. W. 495, 18 Am. & Eng. R. Cas. 217), "extraordinary care and diligence" (Brown *v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, 58 Am. St. Rep. 46), and "extraordinary diligence." Gardner *v. Waycross, etc., Co.*, 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435. And it has been said that a carrier "is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill." Pennsylvania Co. *v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225. These expressions, while they are not objectionable on the ground that they state the rule of care incorrectly, are scarcely explicit enough to be of any practical value in defining, for the instruction of a jury, the degree of care exacted of passenger carriers.

In Clark *v. Eighth Avenue R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495, while a charge requiring the exercise of great care and caution was held not to be erroneous it was said that it is not well calculated to convey to the mind of a jury any accurate idea of what care and diligence is required in the transportation of persons.

But while it seems desirable for courts, when using these vague and unsatisfactory expressions, to explain their meaning, it has been held that they are not bound to do so. In Toledo, etc., *R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71, objection was made to an instruction in which the jury was told that the defendant was bound to exercise extraordinary care, and it was urged that the court did not explain to the jury what was extraordinary care, leaving it to each juror to put his own construction on the phrase. But the appellate court characterized the objection as hypercritical. It, however, does not appear from the report of this case that any request for an explanatory instruction was made in the court below. Possibly it would be the duty of a trial court, when using this and similar phrases, to explain their meaning if properly requested to do so. See St. Louis, etc., *R. Co. v. Sweet*, 60 Ark. 550, 31 S.W. 571.

3. Statements Requiring an Extremely High Degree of Care.

a. In General.

The books contain a number of expressions of the rule which exact not only a very high, but, according to some of the authorities, an excessive degree of care. These statements, together with the criticisms upon them, will be disposed of before the more approved expressions of the rule are considered. It should be borne in mind, however, that in most of the cases in which the expressions about to be considered occur, they were used in the opinions merely by way of argument and were not necessarily meant to be strictly accurate

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statements of the requirement of the law. For this reason, the cases which actually involved the correctness of instructions in which the expressions were used, while cited in the compilation which immediately follows, will be reviewed more in detail later on, in connection with a consideration of the correctness of the statements.

b. Statements Requiring the "Utmost" Care.

Among the expressions of the rule which exact an extremely high degree of care, are statements requiring the exercise of the utmost care (*Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 58 Am. & Eng. R. Cas. 337; *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 9 S. E. Rep. 248, 37 Am. & Eng. R. Cas. 179), the utmost care and caution (*Barrett v. Third Avenue R. Co.*, 45 N. Y. 628, aff'g 8 Abb. Pr. N. S. 205, 1 Sweeny [N. Y.] 568), the utmost care and skill (*Huelsenkamp v. Citizens' St. R. Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 520; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221, aff'g 65 Barb. [N. Y.] 32), the utmost care, skill, and caution (*Washington, etc., R. Co. v. Varnell*, 98 U. S. 480, 25 L. Ed. 233), the utmost degree of care, skill and foresight (*Illinois Cent. R. Co. v. Kuhn* [Tenn. 1901], 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324), the utmost care and vigilance (*Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258), the utmost care and diligence (*Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894; *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629, aff'g 46 Hun [N. Y.] 486; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508, 11 Atl. 815; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Laing v. Colder*, 8 Pa. St. 482, 49 Am. Dec. 533; *Reynolds v. Richmond, etc., R. Co.*, 92 Va. 400, 23 S. E. 770; *McKeon v. Chicago, etc., R. Co.*, 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243), the utmost skill and diligence (*Hazard v. Chicago, etc., R. Co.*, 1 Biss. [U. S.] 503, Fed. Cas. No. 6,275), the utmost vigilance (*Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540), the utmost diligence (*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332), the utmost foresight and prudence (*Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418), and the utmost skill, diligence, and human foresight. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316.

c. Statements Requiring the "Most Exact" Care, etc.

In a few cases it is said that passenger carriers must exercise the most exact care and diligence. *Kellow v. Central Iowa R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858; *McElroy v. Nashua, etc., R. Corp.*, 4 Cush. (Mass.) 400, 50 Am. Dec. 794; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 236. And it has been said that they are bound to use the most watchful care and the most active diligence. *Hadley v. Cross*, 34 Vt. 588, 80 Am. Dec. 699.

d. Statements Requiring the "Highest" or "Greatest" Care, etc.

In some cases it is said that carriers of passengers are bound to exercise the highest degree of care (*McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324, 12 Am. & Eng. R. Cas., N. S., 170, 5 Am. Neg. Rep. 117; *Evansville, etc., R. Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. Rep. 303; *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320), the highest degree of care and skill (*Moore v. Des Moines, etc., R. Co.*, 69 Iowa 491, 30 N. W. 51, 27 Am. & Eng. R. Cas. 315), the highest degree of care, diligence and skill (*Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 47 Am. & Eng. R. Cas. 501, 30

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Am. St. Rep. 65), the highest degree of care, diligence, vigilance and skill (*Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Prothero v. Citizens' St. R. Co.* [Ind.], 33 N. E. 765), the highest degree of care and precaution (*Southern Building, etc., Assoc. v. Dawson*, 97 Tenn. 367, 56 Am. St. Rep. 804. See *Nashville, etc., R. Co. v. Elliott*, 1 Coldw. [Tenn.] 611, 78 Am. Dec. 506), the highest degree of care and prudence (*Coddington v. Brooklyn Crosstown R. Co.*, 102 N. Y. 66, 5 N. E. 797; *Peters v. Rylands*, 20 Pa. St. 497, 59 Am. Dec. 746; *New York, etc., R. Co. v. Daugherty* [Pa.], 11 W. N. C. 437, 6 Am. & Eng. R. Cas. 139), the highest degree of skill and foresight (*Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55, 30 Am. & Eng. R. Cas. 616), and the greatest care and foresight. *Watson v. St. Paul, etc., R. Co.*, 42 Minn. 46, 43 N. W. 904, 41 Am. & Eng. R. Cas. 114.

e. Statements Requiring the "Highest Possible" or "Greatest Possible" Care, etc.

In yet other cases the expression is made somewhat stronger and it is said that passenger carriers must exercise the highest, or greatest, possible care and diligence (*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. [Va.] 431, 26 Am. Rep. 384; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. [Va.] 394), and the highest possible diligence. *Leavenworth, etc., R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

In the case of *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. Ed. 502, Mr. Justice Grier, in delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence." And this language has been quoted with approval in a number of cases. *The New World v. King*, 16 How. (U. S.) 469, 14 L. Ed. 1019; *Goble v. Delaware, etc., R. Co.*, 3 N. J. L. J. 176, Fed. Cas. No. 5,488a; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10, 48 Am. Rep. 10; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 9 S. E. 248.

f. Statements Which, in Effect, Require the Greatest Human Care, etc.

Very like the foregoing expressions in the respect that they exact an extremely high and possibly excessive degree of care, are the statements of the rule which require the exercise of the utmost or greatest human care and foresight (*Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333; *Johnson v. Winona, etc., R. Co.*, 11 Minn. 296, 88 Am. Dec. 83; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323), the utmost human skill and foresight (*Coddington v. Brooklyn Crosstown R. Co.*, 102 N. Y. 66, 5 N. E. 797, 26 Am. & Eng. R. Cas. 393), the highest degree of care which human foresight can suggest (*Marker v. Mitchell*, 54 Fed. 637), all the care and skill which human prudence and foresight can suggest (*Brown v. New York Cent. R. Co.*, 34 N. Y. 404), the utmost care and diligence which human foresight can use (*Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161), the utmost care and diligence which can be bestowed by human skill and foresight (*Chicago, etc., R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, 41 Am. & Eng. R. Cas. 60), the highest degree of care of which human judgment and foresight are capable (*Goddard v. Grand Trunk R. Co. of Canada*, 57 Me. 202, 2 Am. Rep. 39), the utmost diligence which human skill and foresight can effect (*George v. St. Louis, etc., R. Co.*, 34 Ark. 613, 1 Am. & Eng. R. Cas. 294), and every precaution which human skill, care and foresight can provide. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, aff'g 56 Barb. (N. Y.) 425.

It has also been said that carriers of passengers are bound to exercise toward their passengers "the utmost care and diligence in pro-

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viding against those injuries which can be avoided by human care and foresight" (*Ingalls v. Bills*, 9 Met. [Mass.] 1, 43 Am. Dec. 355; *Warren v. Fitchburg R. Co.*, 8 Allen [Mass.] 233, 85 Am. Dec. 700; *Gaynor v. Old Colony, etc., R. Co.*, 100 Mass. 208, 97 Am. Dec. 96); that carriers must provide for the safety of their passengers "as far as human foresight and care will go" (*Kellow v. Central Iowa R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858); that carriers of passengers are bound to transport their passengers safely as far as human care and foresight can avail (*Baltimore, etc., Turnpike Road v. Leonhardt*, 66 Md. 70, 27 Am. & Eng. R. Cas. 194); and that the obligation of a steam railway carrier to its passengers is, as far as it is capable by human care and foresight, to carry them safely, and that it is responsible for all injuries resulting to its passengers from any, even the slightest, neglect. *Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307.

g. The Correctness of the Statements.

(1) In General.

The sufficiency of these statements to express the degree of care required of carriers of passengers is involved in more doubt than is generally supposed. While these statements are often accepted as correct, without question, by courts of recognized authority, the tendency of the later cases is to discountenance their use in instructions to juries, except when accompanied by some appropriate explanation of their meaning, and even to declare them to be erroneous, unless properly limited or explained. And there seems to be good cause for this. Carriers of passengers are neither liable as insurers of the safety of their passengers nor are they bound to exercise the highest care of which the human mind can conceive. *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368, *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 6 27, 27 Am. & Eng. R. Cas. 310; *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300, 45 N. W. 436; *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 306. They have never, it has been said, been held responsible for accidents which, by any possible means, could have been prevented. *Gilbert v. West End St. R. Co.*, 160 Mass. 403, 36 N. E. 60, wherein it was held that it was not error for the trial court to refuse to rule, in an action for personal injuries by a passenger against a carrier, that if it was possible for the defendant to prevent the accident, then defendant was negligent. For example, the law does not, in the present state of railroading, require the use of steel rails and granite cross-ties, because they are more lasting and less liable to decay than iron and wood. *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368; *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300, 45 N. W. 436. There are certain dangers, necessarily incident to every mode of transportation, which the passenger must assume; for, in every case, regardless of the mode of conveyance adopted, to require the carrier to employ every conceivable precaution in rendering the business free from danger would be to compel both the employment of such precautions and the incurring of such expense as would render the business of carrying passengers impracticable and deter every ordinarily prudent and responsible person from engaging in that character of business, thereby defeating the very purpose of the rule of care which is so often invoked in the interests of travelers. For the various expressions of the courts to substantially this effect, see the following cases: *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280, 44 Am. & Eng. R. Cas. 311; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313; *Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas.

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405; Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 3 S. W. 591; Dodge *v.* Boston, etc., S. S. Co., 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83; Simmons *v.* New Bedford, etc., S. Co., 97 Mass. 361, 93 Am. Dec. 99; Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812; Oviatt *v.* Dakota, etc., R. Co., 43 Minn. 300, 45 N. W. 436. While the use of such expressions as utmost care, highest, highest possible, and greatest human care, in describing the degree of care exacted of passenger carriers, does not necessarily amount to making them insurers, still it is apprehended that the employment of these expressions, without explanation, has at least a tendency to convey to the average mind and to the minds of a jury the impression that carriers of passengers are held to the greatest possible care short of making them liable as insurers. And, as is shown by the authorities cited next above, this is not the law. As has been said, these expressions "are misleading, if not erroneous." Wanzer *v.* Chippewa Valley, etc., R. Co., 108 Wis. 319, 84 N. W. 423. And see Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240.

(2) Cases Upholding the Use of the Statements.**(a) In General.**

Still, there are cases in which the employment of these expressions, without explanation, in instructions to juries has been upheld, although sometimes with apparent reluctance and, at other times, on the ground that the instruction was correct as applicable to the facts of the particular case.

(b) Instructions Exacting the Utmost Care Upheld.

Thus instructions exacting the utmost care have been held to be correct. Illinois Cent. R. Co. *v.* Kuhn (Tenn. 1901), 64 S. W. 202, 22 Am. & Eng. R. Cas., N. S., 324. Perhaps the strongest support for the correctness of this instruction is to be found in Iowa. In Sales *v.* The Western Stage Company, 4 Iowa 547, the court below instructed that "carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill, either in themselves or their servants. They are bound to use such care and diligence as a most careful and vigilant man would observe in the exercise of the utmost prudence and foresight." This instruction was approved, the court saying, "a brief examination of the authorities will show most conclusively that the rule laid down is well sustained by the earlier as well as the later cases." This case was approved in Russ *v.* Steamboat War Eagle, 14 Iowa 363. But in Illinois a similar instruction was sustained with evident reluctance. In Chicago, etc., R. Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483, a charge to the effect that it was the duty of the defendant to exercise "the utmost care, skill, and vigilance to carry plaintiff safely, and to protect him against any and all danger from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented," was declared to state the law applicable to the facts of the particular case with sufficient accuracy but it was said that "it might be that, in another case where the facts are materially different, the instruction would not be applicable, and might be held to impose a degree of care and skill not enjoined by the law."

(c) Instructions Exacting the Highest Care Upheld.

An instruction requiring the exercise of the highest degree of care has been held to be unobjectionable for the reason that the expression properly measures the care and diligence which a prudent man would exert in the business under like circumstances. Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243. In another case an instruction requiring the exercise of "the highest degree of care and caution"

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was upheld, but it seems that the court regarded the phrase as somewhat limited by a subsequent instruction. *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, 9 Am. & Eng. R. Cas., N. S., 859. And in *Sears v. Seattle Consolidated St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, the trial court charged the jury that the defendant was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of its cars, so as to prevent injury to its passengers. On appeal by the defendant, the appellant contended that this instruction, in effect, informed the jury that the appellant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to one of its passengers, even though it had used all the care and prudence which it was possible to use under the circumstances. In answer, Anders, J., in delivering the opinion of the court, said: "We do not think that the instruction, especially when applied to the facts and circumstances of the case, is fairly susceptible of the construction placed upon it by counsel for the appellant. If the appellant used all the care and prudence which it was possible to use under the circumstances, then, in the language of the court, it used the highest degree of care, prudence, and caution. The highest degree of care, prudence, and caution in running and operating street cars, so as to prevent injury to passengers, cannot be said to mean such a degree of care as will absolutely prevent injury, or such care as is inconsistent with that mode of conveyance, but means simply the highest degree of practicable care and prudence in conducting that particular business. Instructions similar to the above have frequently been approved by the courts." But, as bearing upon the weight of this case as authority upon this point, it is to be noted that the court, at the request of the appellant, also instructed the jury that while the defendant, as a common carrier of passengers, is held to the highest degree of care and prudence which is consistent with the practical operation of its cars and transaction of its business, still it is not an insurer of the lives and limbs of its passengers, thus explaining the meaning of the former instruction.

(d) Instructions Exacting the Highest Possible Care Upheld.

In *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, the court, in holding that it was not error for the court below to instruct the jury that the plaintiff, who had been injured while a passenger on the defendant's train, was entitled to demand of the defendant the "highest possible degree of care and diligence," said: "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains, air brakes, bell-pulls, and a brakeman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed. The language used cannot mislead. It well expresses the rigorous requirement of the law, and ought not to be departed from."

In a *Kansas* case an instruction requiring "all possible skill, foresight and care" was held to be unobjectionable in connection with the particular facts of the case. *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

e) Instructions, in Effect, Exacting the Greatest Human Care Upheld.

In *Frink & Co. v. Coe*, 4 G. Greene (Iowa) 557, 61 Am. Dec. 141, an instruction "that the proprietors of stage-coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of the passengers, which could have been prevented by human care and foresight," was approved, and it was said that it "is

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quite as moderate towards stage proprietors as the authorities would justify." And in another case involving the right to recover damages for personal damages sustained by a passenger in a stage-coach, the appellate court approved an instruction that stated "that a stage-coach proprietor, who carries passengers for hire, is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight." *Sawyer v. Sauer*, 10 Kan. 466.

In *Missouri Pac. R. Co. v. Johnson* (Mo. 1888), 10 S. W. 325, an instruction which implied that the defendant railroad was bound to carry the plaintiff safely so far as it was possible to do so by the exercise of "human foresight, skill, and judgment," seems to have been thought not to be open to the objection that it was "too onerous and misleading."

In *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408, 72 Am. Dec. 529, the instruction given by the trial court exempted carriers of passengers from liability for those accidents only which occur from circumstances against which human prudence and foresight cannot guard. It was contended on the part of the defense that the rule laid down at the trial imposed upon the defendant carrier of passengers the obligations which attach to carriers of goods, and made him practically an absolute insurer of the safety of passengers. But, in delivering the opinion of the court of appeals, Johnson, C. J., said: "This criticism upon the rule is founded upon what I consider a misinterpretation of the language of the judge. He must not be understood to say that if the jury, looking back at the circumstances of an accident, can see that some course of conduct or precaution would have prevented its occurrence, the carrier is liable for having failed to pursue that course or omitted that precaution. In this sense, and in this sense only, is the position of the defendants' counsel accurate, that human prudence and foresight can guard against every danger not resulting from the act of God or public enemies. The judge was speaking of prudence and foresight to be exercised before the accident, and without knowledge that it was about to occur. If any fear was entertained that the jury might not correctly apprehend the force of the rule, and understand it to be said, not of prudence and foresight to be exercised before the event, but afterwards, and as affirming that if they could then see that particular precautions would have prevented the particular accident, though its likelihood could not be foreseen and did not, therefore, need to be guarded against, some request should have been made to the judge which would have called his attention to the misapprehension which was thought possible. Under those circumstances he would, we must assume, have added such explanations or limitations as might have been legally required." And see *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Maverick v. Eighth Avenue R. Co.*, 36 N. Y. 408. In a recent New York case, the trial court, at the request of the plaintiff, charged the jury that a railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure the safety of its passengers. While the court of appeals held that, under the circumstances of the particular case, the charge was erroneous, in the prevailing opinion by Gray, J., from which O'Brien and Vann, JJ., dissented, it was said that it would be correct in some cases. *Stierle v. Union R. Co.*, 156 N. Y. 70, 50 N. E. 419, aff'g 13 Misc. (N. Y.) 134, rehearing denied in 50 N. Y. 834.

In *Union Pac. R. Co. v. Hand*, 7 Kan. 380, 1 Am. Ry. Rep. 548, at the request of the plaintiff, the trial court instructed the jury that "if the defendant could have prevented the accident by the utmost human sagacity or foresight, with respect to their track, then the defendant is liable." The defendant sought to have it explained to the jury by requesting the court to tell them "that the utmost human sagacity required of the defendant did not require the defendant to take such extraordinary measures in constructing, operating, and maintaining its railroad as are not and have not been in use in the

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constructing, operating or maintaining of railroads." This the court refused to do, and the refusal was assigned as error. But the supreme court said: "We know of no reason peculiar to this state why human life and safety are not as valuable as elsewhere; at any rate, it is not the province of courts to cheapen it, by construing away established principles, laid down to make life secure."

In Baltimore, etc., R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578, an instruction implying that the defendant railroad was liable, as a carrier of passengers, for injuries to the plaintiff if the accident could have been prevented by human care and foresight was held to be correct, especially when accompanied with the important qualification that, in passing upon the question of negligence, "the jury were to have regard to the character of railway transportation."

(3) Cases Declaring the Statements Erroneous.

(a) In General.

On the ground that the expressions under consideration have a too indefinite and uncertain meaning properly to express the degree of care exacted of carriers of passengers, and that they require a higher degree of care than is imposed by law, it has, in a number of cases, been held that they are erroneous.

(b) Instructions Exacting the Utmost Care Declared Erroneous.

Thus it has been held to be error to instruct a jury that passenger carriers are bound to exercise "the utmost care and prudence" (Wanzer v. Chippewa Valley, etc., R. Co., 108 Wis. 319, 84 N. W. 423), or "the utmost care and vigilance." Jackson v. Grand Avenue R. Co., 118 Mo. 199, 24 S. W. 192. In Michigan Cent. R. Co. v. Coleman, 28 Mich. 440, 12 Am. Ry. Rep. 59, a charge which exacted of the defendant railroad, as a carrier of passengers, "the utmost care and skill" was criticised and held to be erroneous on the ground that "the language use would fairly permit the jury to find anything to be negligence which could by any possibility be avoided."

There is also a Georgia case which, although decided under a statute declaring the degree of care to be exercised by carriers of passengers, nevertheless seems to throw some light upon the propriety of the use of the expression "utmost care" in defining the care required. In Georgia, carriers of passengers are, by statute (Ga. Code, sec. 2067), required to exercise extraordinary care and diligence, and "extraordinary diligence" is, by another section of the statute (Ga. Code, sec. 2062), defined to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." In considering the propriety of a charge requiring railroad companies "to observe the utmost care and diligence" for the safe carriage and delivery of their passengers, the supreme court of Georgia, in an opinion delivered by Lumpkin, J., said: "To the mind of the writer, the term just quoted conveys a stronger and more significant meaning than the word 'extreme.' This view, however, may not be sound; for there is much reason for holding that, according to the recognized authorities, these two words are synonymous. The mere substitution, therefore, of the word 'utmost' for the word 'extreme' would not, perhaps, render the charge erroneous. Its real vice consists in laying down the doctrine that a railroad company is bound to use the highest possible degree of diligence in caring for the safety of its passengers; this being the real meaning of the words 'utmost diligence' when used alone, and without qualification, whereas, the legal measure of extraordinary diligence recognized by our Code is, as above shown, only that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances." East Tennessee, etc., R. Co. v. Miller, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216.

(c) Instructions Exacting the Highest Care Declared Erroneous.

And it has been said that, when such general term as "highest degree of care" is employed to define the care required of passenger carriers, the trial court should always explain it so as to show that

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the care exacted of carriers to their passengers is the highest degree of care which a prudent and cautious man would exercise, and that which is reasonably consistent with the mode of conveyance and the practicable operation of the business. *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571. And a charge requiring a defendant railroad company "to operate its cars with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to its passengers" was held to exact a higher degree of care than is imposed by law. *Wanzer v. Chippewa Valley, etc., R. Co.*, 108 Wis. 319, 84 N. W. 423. It has even been held, as will be shown later, to be erroneous to exact of passenger carriers the highest degree of care and skill by men of extraordinary care, skill and prudence, or which a careful and vigilant man would observe. See *infra*, VI, D, 7, b.

(d) Instructions Exacting the Greatest Possible Care Declared Erroneous.

The words "utmost possible care" have been declared to be superlative terms, unsafe and improper to be indulged in, as expressive of the requirement of the law. *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323. And of the language used by Grier, J., in *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468, to the effect that "when carriers undertake to carry persons by the powerful and dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence," it has been said: "These are very strong, but somewhat indefinite, terms." *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382.

(e) Instructions, in Effect, Exacting the Greatest Human Care Declared Erroneous.

It has been held to be error to charge a jury that carriers of passengers are required to exercise the "utmost human foresight, skill and care" (*Dougherty v. Missouri R. Co.*, 97 Mo. 647, 11 S. W. 251, reversing *Dougherty v. Missouri R. Co.*, 81 Mo. 325, 8 S. W. 900, 34 Am. & Eng. R. Cas. 488, 51 Am. Rep. 239), the "utmost diligence which human skill and foresight could effect" (*St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587), or the highest degree of care and diligence of which human judgment and foresight are capable. *Gulf, etc., R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709; *Gulf, etc., R. Co. v. Stricklin* (Tex. Civ. App. 1894), 27 S. W. 1093. An instruction to the effect that a passenger was entitled to all the care which human foresight could furnish her has been held to be clearly erroneous. *Moreland v. Boston, etc., R. Co.*, 141 Mass. 31, 6 N. E. 225. An instruction which implied that a carrier of passengers is responsible for an accident which could be guarded against by human skill and foresight was held to exact too high a degree of care and to be erroneous. *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994.

In holding that it was error for the trial court to instruct the jury that "the defendant as a carrier of passengers for hire was bound as far as human foresight and care would enable it to carry the plaintiff with safety," the Kentucky court of appeals, in an opinion delivered by Hargis, J., said: "This instruction so defined the care that appellant should have exercised, as to require the driver to use such care to protect her as would have shown after the accident that nothing was left undone which might have contributed to that object and avoided the accident. The utmost care and largest foresight of the most skilful human belonging to the race was prescribed as the measure of care which the driver was bound to exercise. Such a degree of care and skill is impracticable, and would, if exacted, force the railroads of this class to employ none but persons who were perfect in skill and care so far as any human being may become so. It will be seen at a glance that such a rule would stop the business of the road or force it to become responsible for every accident where it can be seen after it has happened that it might have been avoided."

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Louisville City R. Co. *v.* Weams, 80 Ky. 420, 8 Am. & Eng. R. Cas. 399, 4 Ky. L. Rep. 287.

In *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695, there is a *dictum* to the effect that an instruction requiring all the care, vigilance, and foresight of which the human mind is capable would lay down too broad a rule. In the course of the opinion of the court delivered by Walker, J., it is said: "While courts, in announcing the rule governing common carriers of persons, have said that they must be held to the utmost degree of care, vigilance, and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render its use impracticable. Nor does it require the utmost degree of care which the human mind is capable of inventing. Such a rule would involve the expenditure of money and the employment of hands, etc., in repairing the public highway over which the carrier has necessarily to pass, so as to render it perfectly safe; and would prevent all persons of ordinary prudence from engaging in that character of business."

(4) Conflict of Authority in Texas.

Upon the question as to the accuracy of these expressions the Texas cases exhibit such a marked inconsistency as to demand separate consideration. The supreme court of Texas has in one case upheld a charge which required a carrier of passengers to use the "utmost care" to provide for the safety of passengers. *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407. And this case was followed by the Texas court of civil appeals in Ft. Worth, etc., *R. Co. v. Rogers* (Tex. Civ. App. 1900), 60 S. W. 61. Some support is also afforded to this holding by *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074. But in this case, while the expression "utmost care" was used in the instructions of the trial court, in one of the instructions the court said that it was the duty of the defendant to exercise "such care and caution * * * as a very prudent and cautious person, under like circumstances, would have exercised." Notwithstanding its previous ruling by which a charge exacting the "utmost care" was upheld, the supreme court of Texas has held it to be error for a trial court to charge a jury that a carrier of passengers is bound to exercise "all possible care." *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829. The opinion in this case refers to but does not overrule the earlier case of *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407, the court contending that "all possible care" has a broader and more unlimited meaning than "utmost care." The phrase "utmost care" is defined to mean "all the care and diligence possible in the nature of the case," while the word "possible," as used in the phrase "all possible care," is defined to mean "capable of being done." This case was followed by the court of civil appeals in a case wherein it was held that a charge exacting of the defendant carrier of passengers "the greatest possible care" was erroneous. *Gulf, etc., R. Co. v. Higby* (Tex. Civ. App. 1894), 26 S. W. 737. A charge instructing the jury that carriers of passengers are held to "the greatest care and diligence" for the safety of passengers and are required "to provide for their safe conveyance as far as human foresight will go," has been held to be erroneous. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Fordyce v. Chancy*, 2 Tex. Civ. App. 24, 21 S. W. 181. But the Texas court of civil appeals at Galveston, in a case which was decided later than either of the above-cited supreme court cases and in which *International, etc., R. Co. v. Welch*, 86 Tex. 204, 24 S. W. 390, 53 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829, was cited, in commenting upon a charge requiring the "utmost degree of care," said that carriers of passengers are not required to exercise the "utmost degree of care," but only that high degree of care which very cautious and prudent persons would exercise under like circumstances. *McCarty v. Houston, etc., R. Co.*, 21 Tex. Civ. App. 568, 54 S. W. 421. While this case would seem to indicate that the earlier of the two supreme court cases cited at the

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commencement of this section should be regarded as overruled, a still later case decided by the court of civil appeals is against that view. Thus in *Houston, etc., R. Co. v. George* (Tex. Civ. App. 1901), 60 S. W. 313, the court upheld a charge which required of a defendant railroad company the exercise of the "highest degree of care" for the safety of its passengers. In so holding the court said that the expression "highest degree of care" is synonymous with, and no broader than "the utmost care," and expressed its belief that a jury would understand the two phrases as meaning the same thing. But see *Texas, etc., R. Co. v. Buckalew* (Tex. Civ. App. 1896), 34 S. W. 165, 3 Am. & Eng. R. Cas., N. S., 432; *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994. These attempts to draw distinctions between such very similar expressions savor of a refinement which is out of place when the propriety of a statement of a rule of law to a jury is concerned. As the supreme court of Texas has said: "The object of giving a charge to the jury is to furnish them a guide by which they can determine from the evidence whether or not the party sought to be charged has done or failed to do the things which by law creates the liability." *International, etc., R. Co. v. Welch*, 86 Tex. 204, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829. Surely the average jury cannot be expected to apply the fine distinctions in which the Texas courts have indulged. It is submitted that these different expressions, for all practical purposes, have substantially the same meaning, and that they should all either be rejected as inaccurate, or accepted as correct, statements of the law.

(5) Sufficiency of the Statements When Properly Limited or Explained.

The use of these general phrases by the trial court in its charge to the jury will not necessarily render the instructions erroneous; if by qualifying or explanatory words in connection with the objectionable phrase, or even in the course of the charge, the meaning of the phrase is properly limited or defined and the rule as to the care required is correctly stated, the error is avoided (*Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690, 40 Am. & Eng. R. Cas. 698; *Chicago, etc., R. Co. v. Grimm* [Ind. App. 1900], 57 N. E. 640), provided, of course, that the instructions are not inconsistent and misleading. *Florida Cent. R. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58.

A charge exacting of railroad carriers of passengers "the highest degree of care," followed by a charge which, in effect, exacted the high degree of foresight and prudence as would be used by very cautious, prudent and competent persons under similar circumstances, has been held to be correct. *Missouri, etc., R. Co. of Texas v. Scarborough* (Tex. Civ. App. 1899), 51 S. W. 356.

In *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571, the trial court, in charging the jury, exacted the "highest degree of care, diligence and skill," but in subsequent instructions, given on motion of the appellant, explained the terms so as to show that the care exacted is the highest degree of care which a prudent and cautious man would exercise, and that which is reasonably consistent with the mode of conveyance and the practicable operation of the business. The reviewing court held that there was no occasion to complain of the language employed in the charge.

In *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45, the trial court instructed the jury that the defendant carrier of passengers was bound to "the highest or greatest degree of precaution and care," but, further along in the instructions, defined the meaning of the expression, "the highest and greatest care" as follows: "The law imposes on the carriers of passengers for hire the utmost prudence and care for the safety of the passengers. By this expression is meant that they must exercise the prudence, skill, and care of a prudent person engaged in the same pursuit. It does not mean that they must, at their peril, adopt every precaution which might by possibility prevent accident or injury, for that would be impracticable, and would impose obligations about things that could not be foreseen,

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and could not, therefore, be guarded against." On appeal to the supreme court it was held that the instruction, taken as a whole, stated the law correctly.

Where a court instructed the jury that the defendant was bound to the exercise of the highest degree of care, prudence, and caution in the running and operating of its cars, so as to prevent injury to its passengers, but also, at defendant's request, instructed the jury that while the defendant, as a common carrier of passengers, is held to the highest degree of care and prudence which is consistent with the practical operation of its cars and transaction of its business, still it is not an insurer of the lives and limbs of its passengers, it was held that there was no error. *Sears v. Seattle Consolidated St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081.

In *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781, the trial court throughout the instructions asserted that the duty owing by a steam-railway carrier to its passengers was to furnish reasonably safe and sufficient road-bed, track, cars, and engine "so far as human skill, diligence, and foresight could provide," and that defendant was "responsible for all injuries resulting from slight negligence" on its part. In another part of the instructions the import of the words "utmost human skill, diligence, and foresight," as used by the court, was explained to be "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." In commenting upon these instructions, the supreme court said: "This is substantially and almost literally the same language as is approved by text-writers of high authority in summarizing the law deducible from all the precedents." * * * * The court also told the jury that the defendant, as a common carrier of passengers, did not undertake to insure the safety of plaintiff. Taking the declarations of law together, we think they stated the obligation of defendant to plaintiff as its passenger with great accuracy. To exercise the highest practicable care which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock, and service reasonably fit and sufficient to safely perform the contract of transportation into which the carrier has entered, is the measure of defendant's legal duty in such cases. * * * * The instructions of the court go no further than to declare this rule in various forms of expression, the meaning of which, taken as a whole, is unmistakable."

In *New Jersey R., etc., R. Co. v. Pollard*, 22 Wall. (U. S.) 341, 22 L. Ed. 877, an instruction which held the carrier to the "greatest possible care and diligence" and required it to show that the "injury was unavoidable by human foresight" but which was coupled with the statement that the carrier was bound to use the "best precautions and improvements in known practical use to secure the safety of its passenger" was held to be correct.

Where an instruction which required the defendant carrier of passengers to exercise the highest degree of care and proceeded to state hypothetically the facts upon which the plaintiff might recover, it was held that these facts sufficiently qualified the general proposition. *Leslie v. Wabash, etc., R. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229. In a case brought against a railroad company by a cattleman who had been injured while riding on defendant's freight train in charge of live stock, the trial court instructed the jury that carriers of passengers must exercise the highest degree of care, but qualified this general proposition by the further statement that the jury should enforce the general rule "with sound judgment and clear reference to the facts of the particular case before them," and that they ought not to apply "the general rule as to the transportation of a passenger on a passenger train to a passenger who comes upon a stock train for the purpose of looking after his stock, because the circumstances are entirely, or at least largely, different." It was held the defendant was not entitled to complain of the instruction. *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551.

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In *Smith v. Chicago, etc., R. Co.*, 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483, the trial court, at the request of the plaintiff, gave an instruction which exacted of the defendant railroad, as a carrier of passengers, the "utmost care." At the request of the defendant, the court told the jury that railroad companies were not insurers of the safety of passengers, and to entitle a passenger to recover it evolved upon her to show that the injury complained of was occasioned by the negligence of the company or its servants. It was held that, the two instructions being taken together, there was no error in the use of the words "utmost care." It is, however, doubtful whether a charge exacting the "utmost care" is, under the authorities which hold the expression to be too rigorous, sufficiently qualified by the bare statement that the carrier is not an insurer; for, as has been said (see *supra*, VI, D, 3, g [1]), the exemption of passenger carriers from responsibility as insurers is not the only limitation upon their liability; they are not bound to exercise the highest conceivable care, which the expression "utmost care" with no other qualification than the one mentioned, seems to exact.

4. Statement Requiring the Highest Care Consistent with the Possibility of Injury.

In a case in which the trial court, at the conclusion of a charge discussing the care to be exercised by passenger carriers, used the expression "the highest degree of care consistent with the possibility of injury" to define the reasonable care which it was, in effect, said that the law requires, the United States circuit court of appeals said of the expression "consistent with the possibility of injury" that, while it was not the happiest which might have been chosen, when read with its context and in the light of the particular case it was not erroneous. "To say to a jury that the law requires that the degree of care to be exercised must be such as is 'consistent with the possibility of injury' is only to say that the care must be commensurate with, or in proportion to, the possibility of injury presented by the particular situation." *Mitchell v. Marker*, 62 Fed. 139.

5. Statements Requiring the Care Exercised by Other Similar Carriers.

It has been said that if railroad carriers of passengers "exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them." *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321. And see *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. Ry. Rep. 59. This language, however, occurred, not in an instruction to the jury, but in the opinion of the court in connection with a discussion of the general liability of passenger carriers. But in a case in which the trial court instructed the jury that the servants of defendant railroad company were bound to exercise a high degree of care, "such as practical and skillful railroad men would have exercised under similar circumstances," it was contended by defendant that the instruction was wrong, especially as there was no evidence in the case as to what care practical and skillful railroad men would have used. It was held that the giving of the instruction was not error. "If the testimony for the plaintiff be true that the train, after slowing up, was started again with a sudden jerk or bulge, and threw the plaintiff off, it required no expert testimony to show what a practical or skillful railroad man would have done, for commonsense and the instincts of humanity teach every man that no practical or skillful railroad man, or any other kind of a man, would have operated the train in that manner." *Grace v. St. Louis R. Co.*, 156 Mo. 295, 56 S. W. 1121.

The supreme court of Iowa, however, has thrown some doubt upon the propriety, in instructions to the jury, of predicated the degree of care upon the practices of other carriers using the same mode of conveyance. In commenting upon an instruction which exacted of a railroad carrier of passengers the degree of care exercised and required by the best, most carefully, prudently, and skillfully managed, rail-

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roads of the country, doing a like business and under like circumstances, Reed, J., in delivering the opinion of the supreme court of Iowa, said: "The doctrine of the instruction is that the degree of care required of defendant in the selection of plans and materials for its roadway, bridges, and appliances was such as was exercised by the best and most skillfully and carefully managed railroads in the country, under like circumstances. The objection urged against it is that it treats the practices of the class of railroads named, in the matters in question, as affording an absolute standard of duty as to those matters, thus, in effect, making the very practices which are called in question the law of the case. We admit the force of the objection." *Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405. In a case in which the trial court instructed the jury, in effect, that unless the accident resulted from defects in the appliances which could have been discovered by the usual and ordinary methods adopted and exercised by railroad companies as ordinarily operated, there could be no recovery, the reviewing court, while admitting that the charge, standing alone and considered without reference to other portions of the charge, was erroneous, refused to reverse for the reason that the objectionable language was subsequently explained. In delivering the opinion of the court, Bartch, C. J., said: "While, however, the instruction, considered in the abstract, is objectionable, still, when read in connection with that portion of the charge which immediately follows it, and is explanatory of it, where the court stated that 'it was the duty of the defendant to use the utmost care and skill which prudent men' in the same kind of business would use under similar circumstances, it is difficult to see how the jury could have been misled thereby. Especially is this so since the charge, considered as a whole, appears to state the law fairly and correctly." *Major v. Oregon Short Line R. Co.* (Utah, 1899), 59 Pac. 522.

6. Statement Requiring the Care Usually Exercised by the Particular Carrier.

Certainly the degree of care cannot be predicted upon the usual practices of the particular carrier, and it is error to instruct the jury, in an action to recover damages for injuries sustained in consequence of the alleged negligent starting of defendant's street car upon which plaintiff was a passenger, to the effect that the plaintiff is not entitled to recover unless the car was started in an unusual and dangerous manner, and that if the jury should find that the car was started in the ordinary manner, and without any unusual circumstances attending the same, and that in the course of its experience defendant had found that the manner adopted at the time of the accident was reasonably safe, and in no manner calculated to cause injury to any of its passengers and should further find as a matter of fact that the methods ordinarily and upon the particular occasion adopted were reasonably safe, and not calculated to injure passengers,—then the defendant cannot be held liable. *Dickert v. Salt Lake City R. Co.* (Utah, 1899), 59 Pac. 95.

7. Statements Making the Care of Prudent Men the Standard.

a. In General.

In defining the degree of care which the law exacts of carriers of passengers, the courts have frequently incorporated in their statements of the rule an important limitation, variously expressed, by which the degree of care required is predicated upon the care exercised by prudent or cautious men. These statements may conveniently be divided into two classes. By one class the degree of care is declared to be the highest or utmost care of prudent men, or the highest or utmost care of very prudent men. By the other class these expressions are qualified and the degree of care exacted is defined to be the highest care which prudent men, or the highest care which very prudent men, would exercise under the same or similar circumstances.

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b. Statements Requiring the Highest Care of Prudent, or Very Prudent, Men.

Among the statements falling within the first of these classes, are those which hold carriers of passengers to the exercise of "the utmost care and diligence of cautious persons" (*Farish v. Reigle*, 11 Gratt. [Va.] 697, 62 Am. Dec. 666), and the somewhat stronger expressions which exact the utmost care and diligence of very cautious persons (*Lusby v. Atchison, etc., R. Co.*, 41 Fed. 181; *Nagle v. California, etc., R. Co.*, 88 Cal. 86, 25 Pac. 1106; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Jamison v. San Jose, etc., R. Co.*, 55 Cal. 593, 3 Am. & Eng. R. Cas. 350; *Sanderson v. Frazier*, 8 Colo. 80, 5 Pac. 632, 54 Am. Rep. 544; *Maverick v. Eighth Avenue R. Co.*, 36 N. Y. 381; *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786), the highest degree of care of a very prudent person (*O'Connell v. St. Louis, etc., R. Co.*, 106 Mo. 482, 17 S. W. 494), or the utmost care and prudence of a very cautious person. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229. It has been said of the statement that carriers of passengers are bound to the utmost care and prudence of a very cautious person, that it does not furnish an exact measure of the care required, but that that difficulty is inherent in the nature of the subject and the statement has this advantage that it conforms substantially to the ordinary definition of the highest degree of care required of bailees of goods, and has, therefore, the sanction of long usage. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229. But, while the statements of this class may not be exactly equivalent to the expressions, "utmost care," "highest care," "greatest human care," etc., which have been condemned by a number of the courts, they come dangerously close to exacting a degree of care more onerous than that imposed by law. It has been held, though the case is not exactly in point for the reasons that the language used is somewhat stronger than in the expressions under consideration, that a charge exacting the "highest degree of care, skill and diligence by men of extraordinary care, skill and prudence in transporting passengers," requires too great a degree of care and is erroneous. *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258. In another case, however, the court seems to have inclined to the opinion that passenger carriers are not bound to exercise the highest degree of skill and care which a careful and vigilant man would observe, in like circumstances, in the management of the business. *Wanzer v. Chippewa Valley, etc., R. Co.*, 108 Wis. 319, 84 N. W. 423. In this instance, it is to be noted, the statement is qualified and made less rigorous by the words, "in like circumstances."

c. Statements Limiting the Care by the Circumstances.**(1) In General.**

Of the statements falling within the second of the above-mentioned classes, it may be said that, while they are not particularly explicit or instructive, they have, except in possibly one case (*Wanzer v. Chippewa Valley, etc., R. Co.*, 108 Wis. 319, 84 N. W. 423), been exempt from judicial criticism, and, it is believed, come nearer expressing the degree of care which the law exacts of passenger carriers than any of the statements which have so far been discussed.

(2) Statements Requiring the Highest Care of Prudent Men under the Circumstances.

According to some of these statements, the care to be exercised by carriers of passengers is the highest care and skill which a cautious or prudent man would exercise under the circumstances (*Mackoy v. Missouri Pac. R. Co.*, 5 McCray [U. S.] 538, 18 Fed. 236; *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536), the utmost degree of precaution and care which prudent men would employ under similar circumstances (*Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860, rehearing denied in 17 Mont. 351, 43 Pac. 713), the utmost care and skill which prudent men would use under similar circum-

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stances (*Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 1 Atl. 9, 21 Am. & Eng. R. Cas. 364), the utmost care and skill which prudent men would use and exercise in a like business, and under similar circumstances (*Jackson v. Grand Avenue R. Co.*, 118 Mo. 199, 24 S. W. 192), that high degree of care which cautious, prudent persons, skilled in the particular business, would commonly use under like circumstances (*Dallas, etc., R. Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925), the utmost care and skill which prudent persons would be likely to exercise as to themselves under the like circumstances, and in the conduct of the business (*Louisville, etc., R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378, 14 S. W. 357), or the highest or utmost degree of care and skill which prudent men are accustomed to use under like or similar circumstances. *The Oriflamme*, 3 Sawy. (U. S.) 397, Fed. Cas. No. 10,572; *Bonce v. Dubuque St. R. Co.*, 5 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; *Louisville City R. Co. v. Weams*, 80 Ky. 420, 8 Am. & Eng. R. Cas. 399, 4 Ky. L. Rep. 287; *Louisville, etc., R. Co. v. Berg* (Ky. 1895), 32 S. W. 616, 17 Ky. L. Rep. 1105; *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45.

But an instruction to the effect that the carrier is bound to use the utmost care and diligence that prudent men should exercise has been held to be erroneous. *Meyer v. St. Louis, etc., R. Co.*, 54 Fed. 116, 4 C. C. A. 221, 58 Am. & Eng. R. Cas. 111. In delivering the opinion of the court, Shiras, J., said: "The care that prudent men should exercise is dependent largely upon the relation they occupy towards the person to whom the exercise of care is due. Degrees of care may be predicated of one who is a common carrier, or of one who is not, but cannot be of prudent men; for the law does not cast upon prudent men any particular degree of care, nor the duty of exercising any greater care than is imposed upon men in general. The degree of care imposed by the law is determined by the relation existing between the parties, as that of carrier and passenger, master and servant, and the like, but not by the character of the individuals occupying the relations named. The instruction, therefore, wholly fails to give to the jury the test to be applied in determining the question of negligence on the part of the railway company."

(3) Statements Requiring the Care of Very Prudent Men under the Circumstances.

What seems to be substantially the same rule as is enunciated in the statements collected in the next preceding section of this note, is expressed in a different form by statements which respectively exact of carriers of passengers the same care as would be exercised under the same circumstances by an extremely cautious person (*Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682), the care which persons of the greatest care and prudence would usually employ in similar cases (*Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395), such a degree of care as would be used by very prudent persons under like circumstances (*Bischoff v. People's R. Co.*, 121 Mo. 216, 25 S. W. 908), such a high degree of care as would ordinarily be exercised by persons of great care and prudence under similar circumstances (*Texas, etc., R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68), such a high degree of care as would be used by very prudent and competent persons under similar circumstances (*St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324), that high degree of care and skill which very cautious persons would use under like circumstances (*Gulf, etc., R. Co. v. Killebrew* [Tex. 1892], 20 S. W. 182, 20 S. W. 1005), that high degree of care which very cautious or prudent persons would exercise under like circumstances (*San Antonio, etc., R. Co. v. Lynch* [Tex. Civ. App. 1900], 55 S. W. 517), that high degree of care that a very prudent person would use, under the same circumstances, about the same matter (*Texas, etc., R. Co. v. Orr* [Tex. Civ. App. 1895], 31 S. W. 696), that high degree of diligence and care which is usually

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exercised by very prudent persons in their own business under like circumstances (*Van de Venter v. Chicago City R. Co.*, 26 Fed. 32), that high degree of care and skill which very cautious persons generally, in their line of business, are accustomed to use, under similar circumstances (*International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766), and that degree of diligence and care which very careful and prudent men take of their own affairs. *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 477; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621. In *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382, an action by a passenger against a railroad, it was said that an instruction which told the jury that if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that if the injury complained of was the result of mere accident, then the defendant was not liable, was entirely correct and proper and the request for the instruction should have been granted.

(4) Statements Requiring the Utmost Care of Very Prudent Men under the Circumstances.

The rule seems to be more strongly expressed by statements which exact the utmost care and precaution which very prudent men would use and exercise under similar circumstances (*Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307), and the "utmost human skill, diligence and foresight, which is such skill, diligence and foresight as is exercised by a very cautious person under like circumstances." *St. Louis, etc., R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883.

d. Statements Requiring the Utmost Caution, or the Caution, Characteristic of Prudent Men.

It has also been said that carriers are required, as to passengers, to observe the utmost caution, characteristic of very careful, prudent men. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 229. But a charge to the effect that a common carrier of passengers "is liable only for the want of such care and diligence as is characteristic of cautious persons," has been declared to be too narrow, and it has been said that it does not express the full degree of the liability of common carriers of passengers. *Galena, etc., R. Co. v. Yarwood*, 15 Ill. 469.

e. Statements Requiring the Highest Care of Prudent and Skillful Railroad Men.

In a few cases involving the liability of railroad companies as carriers of passengers, it has been said that railroad companies are bound to employ the highest degree of care, diligence and skill exercised by those engaged in the carriage of passengers by railroads, known to careful, diligent and skillful persons engaged in such business. *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363; *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258. And, again, it has been said that they must exercise a high degree of care, such as would be exercised by very prudent, careful, and skillful railroad men under the same or similar circumstances. *Olsen v. Citizens' R. Co.*, 152 Mo. 426, 54 S. W. 470.

f. Statement Requiring the Highest Care of Prudent Man in the Same Business.

It has been said that carriers of passengers are bound to exercise the utmost degree of care and skill which prudent persons, engaged in the same business, are accustomed to use and which is consistent with the mode of transportation adopted. *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455. And an instruction which exacted the exercise of the highest degree of care and skill usually exercised by prudent persons in the same business, has been declared to be correct. *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010.

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8. Statement Requiring the Highest or Utmost Practical Care.

The objection that the expressions "highest care," "utmost care" and "greatest human care" exact a higher degree of care than is imposed by law has sometimes been met by inserting the word "practical" in these expressions. Thus, it has been said that carriers of passengers must exercise the highest practical care (Illinois, etc., *R. Co. v. Davidson*, 76 Fed. 517, 46 U. S. App. 300, 22 C. C. A. 306, 1 Chic. L. J. W'kly 583, certiorari denied in 166 U. S. 719, 17 S. Ct. 994, 41 L. Ed. 1186; Louisville, etc., *R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; Louisville, etc., *R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434; Louisville, etc., *R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 57 Am. Rep. 120; *Willmot v. Corrigan*, etc., St. R. Co., 106 Mo. 535, 17 S. W. 490), the highest practical degree of care and skill (*Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451), the utmost practical care and diligence (Louisville, etc., *R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310; Cleveland, etc., *R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 23 Am. & Eng. R. Cas. 492, 54 Am. Rep. 312; Bedford, etc., *R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466), the highest degree of care and skill reasonably practicable (Denver, etc., *R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954; Atchison, etc., *R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 58 Am. & Eng. R. Cas. 360, 20 L. R. A. 729), the highest degree of care and diligence practicable under the circumstances (Baltimore City Pass. *R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. See also, Chicago, etc., *R. Co. v. Grimm* [Ind. App. 1900], 57 N. E. 640), the highest degree of care and diligence possible, under the particular circumstances (Citizens' St. R. Co. *v. Merl*, 134 Ind. 609, 33 N. E. 1014), the highest degree of care consistent with the practical operation of the business (*Schilling v. Winona*, etc., *R. Co.*, 66 Minn. 252, 68 N. W. 1083), and the utmost care which can be exercised under all the circumstances, short of a warranty of the safety of the passengers. Ft. Worth, etc., *R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335. A carrier of passengers, it has been said, is bound to provide for the safe conveyance of passengers "so far as that is practicable by the exercise of human care and foresight." *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 376; *Ladd v. Foster*, 3 Sawy. (U. S.) 547, 31 Fed. 827. While it is undoubtedly true, as has been held of the expression "utmost practicable care" (*Keokuk Northern Line Packet Co. v. True*, 88 Ill. 614), that these statements of the rule do not require a higher degree of care than the law imposes, it is doubtful whether they are sufficiently explicit to be of much practical value in explaining to a jury the care required. However, that is probably an objection which is waived by a failure to insist on a more instructive statement of the rule. In a case in which the trial court charged the jury that the defendant was required to use "the utmost practicable care" it was objected that the expression should have been the "utmost care" and not the "utmost practicable care." On appeal, it was held that the charge, as a whole, was correct, and it was said that "if the word practicable required explanation, plaintiff should have requested it by a suitable special charge." *Levy v. Campbell* (Tex. 1892), 19 S. W. 438.

9. Statements Requiring the Highest Practical Care of Capable and Faithful Railroad Men.

It has been said of railroad companies, as carriers of passengers, that they must employ the "highest practicable care, caution, and diligence which capable and faithful railroad men would exercise in similar circumstances." St. Louis, etc., *R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883. In *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 44 Am. & Eng. R. Cas. 322, 22 Am. St. Rep. 781, the trial court defined the care required of the defendant carrier of passengers as the "highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar cir-

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cumstances." On appeal, the supreme court refused to pass upon the correctness of the instruction for the reason that it was given without objection, but said that it was satisfied with the soundness of the rulings of the court and that to exercise the highest practical care which capable and faithful railroad men would take, in like circumstances, is the measure of the duty of a railroad company to its passengers.

10. Statements Requiring the Highest Reasonable Care.

In a few cases the care exacted of passenger carriers is the strictest care or precaution reasonably within the power of the carrier (*Seymour v. Chicago, etc., R. Co.*, 3 Biss. [U. S.], 43 Fed. Cas. No. 12,685), the highest degree of care which is reasonably within the power of the persons engaged in the business (*Van de Venter v. Chicago, etc., R. Co.*, 26 Fed. 32), the highest degree of care that can reasonably be exercised (*Mexican Cent. R. Co. v. Lauricella*, [Tex. Civ. App. 1894], 26 S. W. 301), or the highest degree of care which may reasonably be exercised in order to prevent those injuries which human foresight can avert. *Eaton v. Boston, etc., R. Co.*, 11 Allen (Mass.) 504, 87 Am. Dec. 730; *White v. Fitchburg R. Co.*, 136 Mass. 321, 18 Am. & Eng. R. Cas. 140. Similarly it has been said that the care exacted is the highest degree of care which a reasonable man would use (*Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319; *Derwoost v. Loomer*, 21 Conn. 253), and every degree of care, diligence and skill which a reasonable man would use under similar circumstances. *Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 499. It has been said that carriers must carry their passengers as safely as human foresight and reasonable care will permit. *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744. In *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309, the Kentucky court of appeals said that "a common carrier of passengers must exercise the highest degree of care and diligence" and then added: "such care as a reasonable and cautious man would use under the circumstances is the diligence required."

11. Approved Statements of the Rule.

It is believed that the objections which have been, and might be, urged to the statements of the rule which have been discussed in the preceding pages are avoided by stating the rule as follows: In providing for the safety of, and guarding against injuries to, their passengers, carriers of passengers, independently of their pecuniary ability, must exercise the highest degree of care and diligence consistent with the practical operation of the business, taking into consideration the mode of conveyance employed.

The books contain a number of expressions of the rule which approximate more or less closely to this statement. Thus, it has been said, in effect, that carriers of passengers are bound to exercise the highest degree of care consistent with the practical operation of the business (*West Chicago St. R. Co. v. Kromshinsky*, 185 Ill. 92, 56 N. E. 1110, aff'g 86 Ill. App. 17; *West Chicago, etc., R. Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334, aff'g 77 Ill. App. 142; *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300, 45 N. W. 436), the highest degree of care that is reasonably consistent with the practical conduct of the business (*Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405), the highest degree of care and diligence which can reasonably be exercised and which is consistent with the operation of the business (*Illinois, etc., R. Co. v. O'Connell*, 160 Ill. 636, 43 N. E. 704, aff'g 59 Ill. App. 463), the highest degree of care consistent with the proper management of the business (*Jordan v. New York, etc., R. Co.*, 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 101), the highest degree of care and diligence that is consistent with the mode of transportation adopted and reasonably practicable (*San Antonio, etc., R. Co. v. Long* [Tex. Civ. App. 1894], 26 S. W. 114), the highest degree of practicable care and diligence which is consistent with the mode of transportation used (*Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695), the highest degree of care, skill

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and diligence practically consistent with the efficient use and operation of the mode of transportation adopted (*Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313), the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted (*Southern, etc., R. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45), and the highest degree of practicable care and diligence which prudent men would observe in a like business, and under similar circumstances. *Sullivan v. Jefferson Avenue R. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167. Railroad companies, it has been said, are, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger, reasonably consistent with their business, "and appropriate to the means of conveyance employed by them," and to adopt the highest degree of practical care, diligence, and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same. *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280. And an instruction to the effect that the law requires everything necessary to the security of the passenger, which is reasonably consistent with the business of the carrier and the means and conveyances employed, has been held not to exact too high a degree of care. *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368. It may be noted that these expressions are to be found, for the most part, in very late cases.

In yet other cases, some of them recently decided, it has been said that passenger carriers are required to do all that human care, vigilance and foresight reasonably can under the circumstances, and in view of the character and mode of conveyance adopted (*Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 142), or, in other words, all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers. *Elliott v. Newport St. R. Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694. In a late Wisconsin case it was said that passenger carriers must exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, and consistent with the practical operation of the business. *Wanzer v. Chippewa Valley, etc., R. Co.*, 108 Wis. 319, 84 N. W. 423. A charge which, in effect, required common carriers of passengers to do all that human care, vigilance, and foresight can reasonably do, under the circumstances, consistently with the character and mode of the conveyance adopted and the practical prosecution of the business, coupled with an instruction that carriers of passengers are not insurers, has been held to be unobjectionable. *Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578, aff'g 48 Ill. App. 41; *Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126.

Of the numerous expressions of the care which the law imposes upon passenger carriers formulated by the courts and text-writers, it is believed that these statements express the rule with the greatest accuracy and, at the same time, give a clear and well defined idea of the very high character of the care required together with the proper limitations. But there are a number of expressions which, although similar to those set forth above, are not so satisfactory, chiefly for the reason that they are not well calculated to convey to the minds of the jury a clear conception of the requirements of the law. These state the required care to be the highest or utmost degree of care which is consistent with the nature of the business or undertaking (*Baltimore, etc., R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175; *Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149; *Philadelphia, etc., R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 44 Am. & Eng. R. Cas. 345, 20 Am. St. Rep. 483, 8 L. R. A. 673; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Warren v. Fitchburg R. Co.*, 8 Allen [Mass.] 233, 85 Am. Dec. 700; *Smith v. St. Paul, etc., R. Co.*,

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32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550, 16 Am. & Eng. R. Cas. 310; *Pray v. Omaha St. R. Co.*, 44 Neb. 167, 62 N. W. 447, 2 Am. & Eng. R. Cas., N. S., 222, 48 Am. St. Rep. 717), the utmost skill, diligence and foresight consistent with the business (*Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736), the utmost care which is consistent with the nature and extent of the business (*Simmons v. New Bedford, etc., Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99), the utmost or highest degree of care, skill, and diligence for the safety of the passenger that is consistent with the mode of conveyance employed (*North Chicago, etc., R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958), and the strictest care which is consistent with the reasonable performance of the contract of transportation. *Knight v. Portland, etc., R. Co.*, 56 Me. 234, 96 Am. Dec. 449. "The law requires common carriers of passengers to do all that human care, vigilance and foresight can, under the circumstances, considering the character and mode of the conveyance, to prevent accident to passengers." *Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812; *Dodge v. Boston, etc., S. S. Co.*, 148 Mass. 207, 19 N. E. 373, 12 Am. St. Rep. 541, 2 L. R. A. 83; *Olds v. New York, etc., R. Co.*, 172 Mass. 73, 51 N. E. 450, 5 Am. Negl. Rep. 38. It has been said that it is the duty of a carrier of passengers to exercise "the utmost care consistent with the nature of his undertaking, and with due regard for all the other matters which ought to be considered in conducting the business." And it has been said that every carrier of passengers for hire "is bound to use the utmost care which is consistent with the nature of the business to guard the passenger against all dangers, from whatever source arising, which may reasonably and naturally be expected to occur, in view of all the circumstances and of the number and character of the persons with whom the passenger will be brought in contact." *Murray v. Lehigh Valley R. Co.*, 66 Conn. 512, 34 Atl. 506. To say, in effect, that carriers of passengers are bound to exercise the highest possible degree of care and diligence to which the mode of transportation used is susceptible (*Missouri Pac. R. Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467, 44 Am. & Eng. R. Cas. 303), is probably putting the matter too strongly according to some of the authorities. The statement would be more satisfactory if the word "reasonably" or "practicably" were inserted before the word "susceptible."

12. Statutory Rule in California and Other States.

In California, it has been provided by a statute which has been copied in certain other states, including Dakota and Montana, that "a carrier of passengers for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of care and skill." Cal. Civ. Code, sec. 2100; Dak. Comp. L. 1887, sec. 3838; Mont. Code 1895, sec. 2790. Since this statute seems to be merely declaratory of the common law, the cases, arising in the states where it has been adopted, which declare the degree of care which is exacted of passenger carriers, have been cited in the course of the foregoing discussion of the common-law rule.

13. Statutory Rule in Georgia.

In Georgia carriers of passengers are, by statute (Ga. Code, sec. 2067), required to exercise extraordinary care and diligence to protect the lives and persons of their passengers. And in another section (Ga. Code, sec. 2062), in enumerating the several degrees of care to be expected of bailees, according to the nature of the particular bailment, the Georgia Code defines "extraordinary diligence" to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." It has been said that, under these statutory provisions, the diligence to be expected of railroad companies in caring for their passengers would be "that extreme care and caution which very prudent and thoughtful persons" would observe in discharging that duty, if devolving upon them.

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East Tennessee, etc., R. Co. *v.* Miller, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216. The care exacted by these provisions is something more than "all ordinary and reasonable care and diligence" (Crawford *v.* Georgia R. Co., 62 Ga. 566); it has been held that an instruction exacting "extraordinary care and vigilance" is not erroneous. Central of Georgia R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848, 52 Am. & Eng. R. Cas. 473; Georgia R. Co. *v.* Homer, 73 Ga. 251, 27 Am. & Eng. R. Cas. 186. But a charge that railroad companies are required to observe the "utmost care and diligence" for the safe carriage and delivery of their passengers has been held to exact a higher degree of care than that prescribed by the statute. East Tennessee, etc., R. Co. *v.* Miller, 95 Ga. 738, 22 S. E. 660, 2 Am. & Eng. R. Cas., N. S., 216. And it has been held to be error for a trial court to charge the jury as follows: "The law is laid in wisdom, as human life is at great risk, especially when public carriers employ steam for rapid transit; and too much diligence cannot be required at their hands. For slight neglect they are, and ought to be, responsible; and, outside of the provisions of our own statute law, such, it is believed, is the rule everywhere in the civilized world." In commenting upon this instruction the supreme court of Georgia, after referring to the section of the statutes which defines the "extraordinary diligence" required of carriers of passengers, said: "We do not see how the degree of diligence could have been more strongly expressed than by the language used in this charge. It certainly puts upon the carrier the very utmost diligence that it could possibly exercise. The law does not thus define the term 'extraordinary diligence,' nor has this court ever decided that these words just quoted mean the greatest possible degree of care that could be exercised." Florida Cent. R. Co. *v.* Lucas, 110 Ga. 121, 35 S. E. Rep. 283.

E. APPLICATION OF THE RULE.

I. Mode of Conveyance Immaterial.

a. In General.

While, as is pointed out in many of the foregoing statements of the degree of care exacted of passenger carriers, the mode of conveyance employed by the carrier is to be taken into consideration in determining whether the high degree of care required by law has been exercised in a given case, this is not equivalent to saying that the degree of care required varies with the mode of conveyance employed; the standard of care is the same whatever may be the mode of conveyance employed, and the mode of conveyance is only to be taken into consideration in determining whether the degree of care which the law exacts has been exercised—whether, in other words, the care employed was the highest practicable care which could be exercised under the circumstances.

b. Stage and Hackney Coaches.

Very naturally the earliest application of the rule was to carriers by stage-coach. Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. Ed. 115; Peck *v.* Neil, 3 McLean (U. S.) 22, Fed. Cas. No. 10,892; Maury *v.* Talmadge, 2 McLean (U. S.) 157, Fed. Cas. No. 9,315; McKinney *v.* Neil, 1 McLean (U. S.) 540, Fed. Cas. No. 8,865; Sanderson *v.* Frazier, 8 Colo. 80, 5 Pac. 632, 54 Am. Rep. 544; Frink *v.* Coe, 4 G. Greene (Iowa) 555, 61 Am. Dec. 141; Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407. Analogously, the requirement has been exacted of carriers by hackney coaches. Bonce *v.* Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

c. Railroads.

It is of course exacted of carriers by railroad to the fullest extent (Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101; Murray *v.* Lehigh Valley R. Co., 66 Conn. 512, 34 Atl. 506, 4 Am. &

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Eng. R. Cas., N. S., 210, 32 L. R. A. 539), the rule being the same when the railroad is owned and operated by a corporation as when owned and operated by private individuals. *Gulf, etc., R. Co. v. Warlick*, 1 Ind. Terr. 10, 35 S. W. 235, 4 Am. & Eng. R. Cas., N. S., 32.

d. Street Railways.

And the same rule as to the degree of care required of carriers of passengers, which is applicable to ordinary steam railways, applies to street railway companies (*Van de Venter v. Chicago City R. Co.*, 26 Fed. 32; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *City, etc., R. Co. v. Findley*, 76 Ga. 311; *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55, 30 Am. & Eng. R. Cas. 616; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754; *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, 18 N. W. 827, 16 Am. & Eng. R. Cas. 310, 50 Am. Rep. 550; *Sullivan v. Jefferson Avenue R. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Jackson v. Grand Avenue R. Co.*, 118 Mo. 199, 24 S. W. 192; *Parker v. Metropolitan St. R. Co.*, 69 Mo. App. 54; *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; *Pray v. Omaha St. R. Co.*, 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 20 L. R. A. 316; *Payne v. Spokane St. R. Co.*, 15 Wash. 522, 46 Pac. 1054; *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, 9 Am. & Eng. R. Cas., N. S., 859, 58 Am. St. Rep. 46; *Cogswell v. West Street, etc., R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500. But see *dictum* to the contrary in *Unger v. Forty-Second Street, etc., R. Co.*, 51 N. Y. 497, aff'g 6 Robt. [N. Y.] 237), even though constructed upon private property. *East Omaha St. R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas., N. S., 300.

e. Carriers by Water.

The rule is not limited to carriers by land but extends to carriers by water (*Pendleton v. Kinsley*, 3 Clif. [U. S.] 416, Fed. Cas. No. 10,922), including steamboat (*Russ v. The Steamboat War Eagle*, 14 Iowa 363; *Dodge v. Boston, etc., S. S. Co.*, 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83), and ferry companies. *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135; *Louisville, etc., Ferry Co. v. Nolan*, 135 Ind. 60, 34 N. E. 710; *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 87 Am. Dec. 717; *Hazman v. Hoboken Land & Improvement Co.*, 50 N. Y. 53, aff'g 2 Daly (N. Y.) 130.

f. Elevators.

It is now well settled that the care and diligence which the law imposes upon passenger carriers generally, rests upon those operating elevators for raising and lowering persons from one floor to another in buildings. *Mitchell v. Marker*, 62 Fed. 139, 10 C. C. A. 306; *Marker v. Mitchell*, 54 Fed. 637; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Springer v. Ford*, 88 Ill. App. 529; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673; *Southern Building, etc., Assoc. v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804. Compare *People's Bank v. Morgolofski*, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403, and *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655.

2. When Passengers Are Carried on Freight Trains.

a. Assumption of Risks by Passengers.

As has been stated in an earlier section of this note (see *supra*, VI, D, 3, g), there are certain dangers necessarily incident to every mode of transportation, regardless of the character of the conveyance

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employed, which the passenger must be deemed to assume. Applying this reasonable limitation of the carrier's liability to the carriage of passengers by freight, or other similar trains, it may be said that when one takes passage upon a mixed, freight, or other similar train, he does so with the diminution of comfort and the increased risks reasonably and necessarily incident to the operation of trains of that character.

United States.—Fitchburg R. Co. *v.* Nichols, 85 Fed. 945, 29 C. C. A. 500; Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 28 U. S. 375, 14 C. C. A. 368; Hazard *v.* Chicago, etc., R. Co., 1 Biss. (U. S.) 503, Fed. Cas. No. 6,275.

Indiana.—Louisville, etc., R. Co. *v.* Bisch, 120 Ind. 549, 22 N. E. 662, 41 Am. & Eng. R. Cas. 89; Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 27 Am. & Eng. R. Cas. 210, 57 Am. Rep. 114; Indiana, etc., R. Co. *v.* Masterson, 16 Ind. App. 323, 44 N. E. 1004.

Maine.—Dunn *v.* Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267.

Massachusetts.—Olds *v.* New York, etc., R. Co., 172 Mass. 73, 51 N. E. 450, 5 Am. Negl. Rep. 38; Heyward *v.* Boston, etc., R. Co., 169 Mass. 466, 48 N. E. 773, 10 Am. & Eng. R. Cas., N. S., 260.

Minnesota.—Schilling *v.* Winona, etc., R. Co., 66 Minn. 252, 68 N. W. 1083; Oviatt *v.* Dakota, etc., R. Co., 43 Minn. 300, 45 N. W. 436; Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447, 34 Am. & Eng. R. Cas. 274, 8 Am. St. Rep. 653.

Missouri.—Wait *v.* Omaha, etc., R. Co. (Mo. 1901), 65 S. W. 1028; Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486; McGee *v.* Missouri, etc., R. Co., 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706.

North Carolina.—Wallace *v.* Western, etc., R. Co., 98 N. Car. 494, 4 S. E. 503, 34 Am. & Eng. R. Cas. 553, 2 Am. St. Rep. 346.

Texas.—San Antonio, etc., R. Co. *v.* Robinson, 79 Tex. 608, 15 S. W. 584.

Instructions which properly recognize this assumption by passengers of the increased risks incident to travel by freight trains are not objectionable. It has been held proper to instruct a jury "that in taking passage on a freight train the intestate took upon himself the additional risks, if any, in excess of the risks incident to a passage on the same road in a passenger train." *Ohio Valley R. Co. v. Watson*, 93 Ky. 654, 21 S. W. 244, 58 Am. & Eng. R. Cas. 418, 40 Am. St. Rep. 211, 19 L. R. A. 310. In an action to recover damages sustained by the plaintiff while a passenger upon a freight train of the defendant, the trial court instructed the jury in substance as follows: A man who voluntarily takes passage upon a train which is not a passenger train, but only an ordinary freight train, is only entitled to look for such security as that mode of conveyance is reasonably expected to render. In that case, if he receives an injury while he is seated inside of the cab, and such injury is caused by a jolt or a jar such as is usual and necessary in coupling the cars of a freight train, he cannot recover. When a passenger train is provided for the transportation of passengers on a railway, and one voluntary takes passage on a freight train rather than wait for the passenger train, a railway company would not be liable to him for injuries received from a jolt or jar in the coupling of their cars, if it was such as was usual and necessary, the burden being upon the railroad to establish the necessity of the same. If, notwithstanding the exercise of extraordinary diligence on the part of the railway company, such injury resulted, the plaintiff would not be entitled to recover. But, unless such diligence was established on their part, if the plaintiff received injuries in consequence of the negligent acts of the defendant described in the declaration, he would be entitled to recover. And, further, that the jury were authorized to inquire whether it was such an injury as might reasonably be expected to occur under the circumstances; and, if they found that such injury was reasonably to be expected, then it was the duty of the company to carefully guard

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against a jolt in coupling the cars which would produce such an injury. But if, on the contrary, it was an injury of a character never before known to occur, and therefore not an injury which might reasonably have been expected, under the circumstances; and if, in coupling and uncoupling, the machinery was handled as machinery of like character would be handled by a prudent and thoughtful person in the exercise of extreme care and caution, and the jolt was no greater than the jolt usual under such circumstances,—then, even if the plaintiff was injured thereby, the jury would be authorized to find for the defendant. On error, the charge was sustained, the court saying that, under the facts of the case it was a fair charge, and presented the law correctly. *Crine v. East Tennessee, etc., R. Co.*, 84 Ga. 651, 11 S. E. 555. To a charge that “a person taking passage on or riding on freight trains, where the railroad runs passenger trains on its road for the benefit of travelers, assumes the extra danger, if any, as is necessarily incident to traveling on freight trains,” it was objected that “ordinarily” should have been substituted for “necessarily.” But the Texas court of civil appeals said that “The charge given was not incorrect, and, if appellant desired any further and more favorable instruction, it should have requested it.” *Ft. Worth, etc., R. Co. v. Rogers* (Tex. Civ. App. 1900), 60 S. W. 61.

It is even the duty of the trial court, in a proper case, to call the attention of the jury to this limitation of the carrier's liability. A trial court instructed the jury that when a railroad company admits passengers into a way car attached to a freight train, for the purpose of carrying passengers to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of passengers as though they were in regular passenger coaches at the time of the occurrence of the injury. The responsibility of the railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried. If the passenger is lawfully on the cars, the company is bound to carry him safely. In commenting upon this instruction the supreme court of Michigan said: “The propositions that, if the passenger is lawfully on the cars, the company is bound to carry him safely, and that ‘the responsibility of the company for the safety of its passengers does not depend on the kind of cars in which they are carried,’ are broad, and, in our judgment, would lead the average juror to understand that the railroad company was an insurer of the safety of the passengers, and that the same degree of protection is requisite upon a freight train as upon the best-equipped passenger train.” *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103, 72 N. W. 1112, 4 Det. L. J. 781. In a case in which the trial court charged the jury broadly to the effect that whether a person boards a freight train, mixed train, or passenger train, does not make any difference so far as the liability of the carrier is concerned, the law fixing upon a carrier, who undertakes to convey passengers by freight trains, that degree of care which attaches to common carriers of passengers, and refused a charge, requested by the defendant, that “in boarding a freight train, passengers assume the increased risks and diminution of comfort incident thereto, and, if the train is managed with the care usual and requisite for such trains, it is all that those who voluntarily board them have a right to expect,” the supreme court of South Carolina said that the general charge given should have been modified substantially in accord with the defendant's request. “A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train with all reasonable skill and caution as a freight train. Whatever the mode of conveyance, whether by passenger, mixed, or freight train, the carrier is liable for any negligence resulting in injury to a passenger, and in that sense the law requires the highest degree of

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care in all cases, but, in applying this rule, the jury should take notice of the particular mode of conveyance. For illustration, in the management of a regular passenger train, the highest degree of care may require the use of a bell cord, or a brakeman on each car, or automatic brakes, but in the management of a freight train the same degree of care may not require these things." In conclusion the court said that, since it could not be sure "that the jury may not have found the issue of negligence against defendant because of the absence of some safeguard against danger which the highest degree of care would require in the management of a regular passenger train," there should be a new trial under unequivocal instructions. *Steele v. Southern Ry.*, 55 S. Car. 389, 33 S. E. 509, 74 Am. St. Rep. 756. But in a federal case the trial court refused to give an instruction, requested by the defendant company, "that a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and, if it is managed with the care requisite for such a train, it is all those who embark upon it have a right to demand. The passenger can only expect such security as the mode of conveyance affords." In sustaining the refusal of the trial court to give the instruction, Shiras, District Judge, in delivering the opinion of the court, said: "It is possible to imagine or suggest cases in which the facts would be such as to make the request above quoted entirely proper, and also to require a more full statement of the abstract rule of law given by the court in its charge; but there was nothing developed in the evidence in this case that called upon the court to instruct the jury in regard to any increased risks or discomforts attending a passage in the caboose of a freight train, as compared with a passage in a drawing-room car forming a part of a passenger train. The injury to the defendant in error did not grow out of a risk peculiar to a freight train. It might just as easily have occurred if the train had been composed of passenger coaches, for the injury resulted from the passenger leaving the car when in motion, which may occur as readily with passenger as with freight trains." *Eddy v. Wallace*, 49 Fed. 801, 4 U. S. App. 264, 1 C. C. A. 435.

b. Degree of Care Exacted of the Carrier.

Subject to the above-stated limitation, which, indeed, though more obviously applicable, is not specially peculiar, to the carrying of passengers by freight trains, the same high degree of care is to be exercised by the carrier when passengers are carried by mixed, freight, construction, and other similar trains as when carried by regular passenger trains.

United States.—*Sprague v. Southern R. Co.*, 92 Fed. 59, 63 U. S. App. 711, 34 C. C. A. 207, 14 Am. & Eng. R. Cas., N. S., 356; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368; *Eddy v. Wallace*, 49 Fed. 801, 4 U. S. App. 264, 1 C. C. A. 432; *Lusby v. Atchison, etc., R. Co.*, 41 Fed. 181; *Hazard v. Chicago, etc., R. Co.*, 1 Biss. (U. S.) 503, Fed. Cas. No. 6,275.

Alabama.—*Southern R. Co. v. Crowder* (Ala. 1901), 30 So. 592.

Arkansas.—*St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587.

California.—*Green v. Pacific Lumber Co.* (Cal. 1900), 62 Pac. 747; *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894.

Georgia.—*Central of Georgia R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64. See also, *Garland v. Southern R. Co.*, 111 Ga. 852, 36 S. E. 595, 18 Am. & Eng. R. Cas., N. S., 759; *Smith v. Central R., etc., Co.*, 80 Ga. 526, 5 S. E. 772, 34 Am. & Eng. R. Cas. 456; *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.

Illinois.—*New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, 4 Am. & Eng. R. Cas., N. S., 174; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411; *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

Indiana.—*Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, 52 Am. & Eng. R. Cas. 454; *New York, etc., R. Co. v. Doane*,

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115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157; *White Water, etc., R. Co. v. Butler*, 112 Ind. 598, 14 N. E. 599, 34 Am. & Eng. R. Cas. 467; *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381, 8 N. E. 226, 27 Am. & Eng. R. Cas. 210, 57 Am. Rep. 114. See also, *Indiana, etc., R. Co. v. Masterson*, 16 Ind. App. 323, 44 N. E. 1004.

Iowa.—*Quackenbush v. Chicago, etc., R. Co.*, 73 Iowa 458, 35 N. W. 523, 34 Am. & Eng. R. Cas. 545.

Kansas.—*Missouri Pac. R. Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467, 44 Am. & Eng. R. Cas. 303. See *Chicago, etc., R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923, 2 Am. & Eng. R. Cas., N. S., 206.

Kentucky.—*Ohio Valley R. Co. v. Watson*, 93 Ky. 654, 21 S. W. 244, 58 Am. & Eng. R. Cas. 418, 40 Am. St. Rep. 211, 19 L. R. A. 310.

Maine.—*Dunn v. Grand Trunk R. Co.*, 58 Me. 186, 4 Am. Rep. 267.

Maryland.—*Baltimore, etc., R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 2 Am. & Eng. R. Cas., N. S., 187, 31 L. R. A. 313.

Minnesota.—*Schilling v. Winona, etc., R. Co.*, 66 Minn. 252, 68 N. W. 1083; *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300, 45 N. W. 436.

Missouri.—*Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410, 6 L. R. A. 409; *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; *McGee v. Missouri, etc., R. Co.*, 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706.

New York.—*Edgerton v. New York, etc., R. Co.*, 39 N. Y. 227, aff'g 35 Barb. (N. Y.) 389.

North Carolina.—*Wallace v. Western, etc., R. Co.*, 98 N. Car. 494, 4 S. E. 503, 34 Am. & Eng. R. Cas. 553, 2 Am. St. Rep. 346.

South Carolina.—*Steele v. Southern Ry.*, 55 S. Car. 389, 74 Am. St. Rep. 756.

Texas.—*International, etc., R. Co. v. Irvine*, 64 Tex. 529, 23 Am. & Eng. R. Cas. 518; *Ft. Worth, etc., R. Co. v. Rogers* (Tex. Civ. App. 1900), 60 S. W. 61; *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. 1074; *Mexican Cent. R. Co. v. Lauricella* (Tex. Civ. App. 1894), 26 S. W. 301, 47 Am. St. Rep. 103. As was said by Mr. Justice Swayne in *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, "Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains; the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise." Accordingly, a passenger who accompanies cattle, or other live stock, upon a freight train is entitled, subject to the different conditions of the service, to the same high degree of care on the part of the railroad company as it owes to passengers upon its regular passenger trains.

United States—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627; *Fitchburg R. Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 386. Compare *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551.

Florida.—*Florida R., etc., Co. v. Webster*, 25 Fla. 394, 5 So. 714.

Illinois—*New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, 4 Am. & Eng. R. Cas., N. S., 174; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 31 Am. & Eng. R. Cas. 61, 5 Am. St. Rep. 510. See also, *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 11 Am. & Eng. R. Cas., N. S., 163, 66 Am. St. Rep. 253, 43 L. R. A. 210.

Indiana.—*Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, 52 Am. & Eng. R. Cas. 454. Where one took passage upon an accommodation train and, at an intermediate station, the coach in which he was riding was switched upon a side track and a freight train backed upon the side track for the purpose of coupling to and

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carrying the car to the passenger's destination, the railroad company, it was held, was bound to exercise that extraordinary diligence which is required of every carrier of passengers. *Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 495, 15 S. E. 848.

c. Statutory Rule in Mississippi.

It is provided by statute in Mississippi that "for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable except for gross negligence or carelessness of its servants." Miss. Code, 1886, sec. 1054; Miss. Ann. Code, 1892, sec. 3557. Under this statute to charge a railroad company with liability to a passenger who is carried on a train which is only designed for the transportation of freight and not for the transportation of passengers as well, it must appear that the company has been guilty of gross negligence. *Reber v. Bond*, 38 Fed. 822. A train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose. *Perkins v. Chicago, etc., R. Co.*, 60 Miss. 726, 21 Am. & Eng. R. Cas. 242.

8. When Passengers Are Carried on Freight Elevators.

In analogy with the rule applied when railroad companies carry passengers by freight trains, it has been held that a person who rides in a freight elevator, knowing that it is not designed to carry passengers, assumes the risks incident to riding thereon, and the owner is not liable simply because the elevator is not equipped with the appliances and safeguards which experience has shown to be the most effective in securing the safety of passengers. *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

4. When Passengers Are Carried Free.

a. General Rule.

The law always imposes upon every one who attempts to do anything, even gratuitously, for another an obligation to exercise some degree of care and skill in the performance of what he has undertaken. *Coggs v. Bernard*, Ld. Raym. 909. "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." 1 Sm. Lead. Cas. 95, quoted, with approval, in *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. Ed. 502. But compare *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623, aff'g 10 How. Pr. (N. Y.) 97. When, therefore a carrier of passengers voluntarily undertakes to transport passengers, without compensation, he owes them a duty to exercise care for their safety and, at least in the absence of an express contract to the contrary, is liable for negligence. But while there can be no doubt that when passengers are voluntarily carried free, the carrier, in the absence of contract limiting the liability, owes them a duty to exercise care for their safety, the courts, for a long time, hesitated to define the degree of care required. In *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623, aff'g 10 How. Pr. (N. Y.) 97, it was held that railroad companies are liable for injuries resulting from negligence in carrying passengers over their roads, whether with or without compensation, but added that "the matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question however does not arise here." And in *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, in which the question was how far it was competent for a carrier of persons to contract for an exemption from liability for injuries caused by negligence, the court incidentally remarked that a carrier undertaking to carry one gratuitously "must do it carefully, as with other passengers," but did not say that the carrier must exercise the same degree of care as in other cases. In *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49, 7 Allen

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(Mass.) 207, 83 Am. Dec. 679, the court recognized the obligation of a carrier to observe due and reasonable care for the safety of one who is carried gratuitously, but expressly said that it did not appear that the facts proved at the trial rendered it material to consider whether a less degree of care was demandable than in cases where fare is paid. In some of these early cases, although frequently cited to the proposition that a passenger carried gratuitously is entitled to the same care as one paying fare, the courts went no farther than to hold that the carrier is liable to a free passenger at least for gross negligence, i. e., for a failure to exercise slight care. Thus, in *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. Ed. 502, which is frequently cited as a leading case on this question, the facts were that plaintiff, who was a stockholder in defendant railroad company, was, by invitation of its president, given free transportation in a small locomotive car used for the convenience of the officers of the company, and while so riding was injured in a collision. The jury found the injury to have been the result of gross negligence, and the court expressly said that it was not called upon to express an opinion whether the care demandable by one who is being carried gratuitously is the same that is due to those carried for hire. And in *The New World v. King*, 16 How. (U. S.) 469, 14 L. Ed. 1019, plaintiff, who had been given a free pass on a steamboat in accordance with a custom to permit persons whose usual employment is on board of such boats to go from place to place free of charge, brought suit to recover for injuries sustained during the journey, in consequence of the explosion of the boiler flue through the negligence of defendant. It was held that defendant had been guilty of gross negligence, within the meaning of that term as it is usually employed, and the court expressly said that it was not necessary to determine whether precisely the same obligations in all respects on the part of the master and the owners and their boats existed in the particular case as in that of an ordinary passenger paying fare. But, while the question as to the degree of care due passengers carried free is not determined in these early cases, the later cases, though frequently very unsatisfactory for the reason that the rule is expressed in vague and uncertain language, and the cases which have been discussed above are cited as authority, show clearly that the general tendency of the courts now is to hold that a person whom a public carrier of passengers carries free, the free passage having been legally and properly obtained, is entitled to the same degree of care as if he were a passenger for hire.

United States.—*Waterbury v. New York, etc., R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. 671; *In re California Nav., etc., Co.*, 110 Fed. 670. See *Chamberlain v. Pierson*, 87 Fed. 420, 31 C. C. A. 157. But compare *Hospes v. Chicago, etc., R. Co.*, 29 Fed. 763.

Georgia.—*Metropolitan St. R. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730, 41 Am. & Eng. R. Cas. 240.

Illinois.—*Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

Indiana.—*Russell v. Pittsburgh, etc., R. Co.* (Ind. 1901), 61 N. E. 678, ante, p. 601; *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339; *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101. See *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

Iowa.—See *Rose v. Des Moines, etc., R. Co.*, 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326, which, however, turned wholly, or in part, on the construction of an Iowa statute.

Maine.—See *Hoar v. Maine Cent. R. Co.*, 70 Me. 65, 35 Am. Rep. 299.

Maryland.—*Abell v. Western, etc., R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Massachusetts.—See *Dickinson v. West End St. R. Co.* (Mass. 1901), 59 N. E. 60; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478, 20 N. E. 103, 37 Am. & Eng. R. Cas. 54, 2 L. R. A. 502.

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Michigan.—See *Flint, etc., R. Co. v. Wier*, 37 Mich. 111, 26 Am. Rep. 499.

Minnesota.—*Gradin v. St. Paul, etc., R. Co.*, 30 Minn. 217, 14 N. W. 881, 11 Am. & Eng. R. Cas. 644; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360.

Missouri.—*Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. 315, 28 Am. & Eng. R. Cas. 157; *Sherman v. Hannibal, etc., R. Co.*, 72 Mo. 62, 4 Am. & Eng. R. Cas. 589, 37 Am. Rep. 423; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Buck v. People's R., etc., Co.*, 108 Mo. 179, 18 S. W. 1090, 52 Am. & Eng. R. Cas. 512; *Dorsey v. Atchison, etc., R. Co.*, 83 Mo. App. 528.

Tennessee.—*Washburn v. Nashville, etc., R. Co.*, 3 Head. (Tenn.) 638, 75 Am. Dec. 784.

Texas.—*Gulf, etc., R. Co. v. McGowan*, 65 Tex. 640, 8 S. W. 57, 26 Am. & Eng. R. Cas. 274. See *Prince v. International, etc., R. Co.*, 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

This rule has frequently been applied to the case of employees and ex-employees of railroad companies riding free. Thus, an employee of a railroad company who is given free transportation to and from his place of work is, it has been held, entitled to the same care as if he pays his fare. *Abell v. Western, etc., R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503; *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556. And an employee of a railroad company while engaged in bridge building was directed by the company to go to another point on the road to assist in loading timber for the bridge. He was given free transportation. In an action which he brought to recover damages for injuries received during the journey, the company was held to the exercise of the same care for his safety as it owed to passengers generally. *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101. An employee of the railroad company left his work without permission, and was received on board of one of the company's trains without objection on the part of the conductor, who was charged with duty of excluding persons not lawfully entitled to be on the train. In an action by the servant to recover for injuries sustained in a collision, it was held that the liabilities of the company as a carrier of passengers attached, and that he was entitled to recover, although he was at the time of the injury riding free. *Washburn v. Nashville, etc., R. Co.*, 3 Head. (Tenn.), 638, 75 Am. Dec. 784. A person who had been an employee of a railroad company was injured while riding on a construction train of the company. He had paid nothing for his passage. But it was held that the fact that the company was carrying him gratuitously could make no difference; the company was nevertheless bound to exercise the full measure of care due passengers for his safety. *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

It has also been broadly held that the fact that a person who accompanies live stock is carried free does not relieve the carrier of the obligation to exercise the same high degree of care which it owes to passengers who pay fare. *Waterbury v. New York, etc., R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. 671. But while the courts which hold that persons riding on drover's passes are entitled to all the care that is due to passengers paying fare quite generally advert to the principle that the fact that no fare is paid makes no difference in the care required, they usually place the responsibility of the carrier upon the additional ground that, since a drover's pass is a part of a transaction beneficial to the carrier, the drover is not merely a gratuitous passenger but is, in effect, a passenger for hire. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627; *Fitchburg R. Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10, 48 Am. Rep. 10; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

The reason for holding that persons riding on drover's passes are entitled to the same degree of care as regular passengers, has been

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applied in the case of a United States mail clerk, and it has been held that a mail clerk is entitled to the same care as other passengers. *Cleveland, etc., R. Co. v. Kercham*, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339.

So, too, it has been suggested that an employee of a palace or sleeping-car company should be considered, not as a licensee carried gratuitously, but as a person whose fare is paid by his employer when entering into the contract with the railroad company. *Russell v. Pittsburgh, etc., R. Co.* (Ind. 1901), 61 N. E. 678, 23 Am. & Eng. R. Cas., N. S., 601.

b. Kansas Decisions.

The supreme court of Kansas has rendered some decisions which, although not against the general rule that the liability of passenger carriers to passengers carried free is the same as to those paying fare, make what seems to be a peculiar application of the limitation that the free passage must have been legally and properly obtained. Thus it has been held that a railroad company does not owe to a person riding on one of its trains without payment of any fare, merely by sufferance of the conductor in charge of the train, that high and extraordinary degree of care for his personal safety that is due to an ordinary passenger paying the customary fare, but is liable only in such case for injuries occasioned by the ordinary negligence of its employees. *Kansas City, etc., R. Co. v. Berry*, 53 Kan. 112, 36 Pac. 53, 42 Am. St. Rep. 278. In an earlier case it was held that a railroad company is not bound to exercise that extraordinary care due to passengers carried for hire for the safety of a person on a construction train with the consent of the conductor, but that it is bound to ordinary care for his safety. *St. Joseph, etc., R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461, 26 Am. & Eng. R. Cas. 173. It is believed that these cases are not in line with the authorities in other jurisdictions. In most of the states the plaintiffs in these cases would have been held to be either passengers, entitled to a high degree of care, or trespassers, entitled to no care, accordingly as the employees extending the privilege of free passage did or did not have authority, real or apparent, to do so.

VII. LIABILITY AS AFFECTED BY STATUTES.

A. IN GENERAL.

While the statutes of Georgia, California, and other states, to which reference has already been made, merely define the degree of care to be exacted of passenger carriers, statutes have been enacted in some states which go farther, and deal with the general nature of the carrier's liability.

B. TEXAS STATUTE EXPRESSLY ADOPTING THE COMMON LAW.

In Texas the common law on the subject has been expressly adopted by a statute which provides that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law, and the remedies against them shall be the same, except where otherwise provided by this title." *Sayles' Civ. St. Tex.*, art. 277.

C. NEBRASKA STATUTE MAKING RAILROADS LIABLE AS INSURERS.

1. Provisions of the Statute.

But in Nebraska it is provided by the Act of June 22, 1867, that every railroad company "shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." *Neb. Comp. Stat. 1895*, ch. 72, art. 1, sec. 3.

CANNON v. CLEVELAND, C., C. & ST. L. RY. CO.*(Supreme Court of Indiana, Nov. 26, 1901.)*

[62 N. E. Rep. 8.]

Negligence—Railroads—Injury to Trespasser on Track.*

A person injured while using a footway on a railroad track for her own convenience, which had been used by the public for six months without any dedication by the company, is not entitled to maintain an action against the company therefor for a failure to maintain watchmen, or operate gates, or give warning of the approach of trains, since the company owed plaintiff no duty except to refrain from willful or wanton negligence.

Appeal from circuit court, Floyd county.

Action by Mamie G. Cannon against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of the defendant, the plaintiff appeals. Affirmed.

Stotsenburg & Weathers, for appellant.

John T. Dye, for appellee.

BAKER, J. A demurrer for want of facts was sustained to appellant's complaint, in which she demanded judgment for \$10,000 for personal injuries. She refused to plead further, and judgment for appellee was entered. The ruling on the demurrer is assigned as error.

The material parts of the complaint are these: "That on March 21, 1896, the defendant was, and for more than six months previous thereto had been, engaged in operating a railroad in and through Delaware county, Indiana, with railroad tracks upon and over which locomotives and cars were run and propelled by steam; that the railroad passed through the city of Muncie, in Delaware county, and was constructed and operated in and through a thickly-settled part of said city, where numerous foot passengers were compelled to walk on, along, over, and across said railroad tracks; that for the convenience of said railroad company, and to enable it better to carry on its business, it had constructed its said railroad on, over, and across certain lots in said city of Muncie owned by said defendant, and had constructed an open roadway five feet in width extending from Mulberry street to Walnut street; that, although the said strip of land so opened and used by said defendant was the private property of said company, yet with the knowledge and consent of the defendant the same was, and for more than six months previous to the happening of the grievances hereinafter mentioned had been, continually

*As to railroad's duty to trespassers on track, see *Grady v. Georgia R. R. & Banking Co. (Ga.)*, 20 Am. & Eng. R. Cas., N. S., 400, and foot-note.

As to what are the duties and liabilities of railroad companies to licensees walking on or crossing railroad tracks, see *Jones v. Charleston, etc., Ry. Co. (S. Car.)*, 23 Am. & Eng. R. Cas., N. S., 261, and foot-note.

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also, *Chicago, etc., R. Co. v. Wolfe* (Neb. 1901), 86 N. W. 441, 22 Am. & Eng. R. Cas., N. S., 26. And the application of the statute seems to have been altogether ignored in an early Nebraska case wherein it was held that a passenger could not recover damages for injuries sustained in consequence of the train, upon which he was riding, being blown from the track by a sudden gust of wind. *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

In one of the Nebraska cases which involve the interpretation of this statute, it is said that "the purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurers against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passengers receiving injury under the circumstances contemplated. Under this statute it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant, when damages were inflicted upon the person of such passenger, to entitle a recovery of whatever amount of damages may be established by the evidence; in other words, these facts being shown, any damage resulting from the operation or management of the train is, without more, presumed to be entirely attributable to the negligence of the railroad company, and to avoid liability it then devolves upon such company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of said road actually brought to his or her notice." *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913. But in the federal cases cited above (*Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541) the court, in response to the claim that the right of action which accrued to the plaintiff under the Nebraska statute could not be asserted in the courts of any other jurisdiction, said: "The contention is not sound. This is not a penal, but a remedial, statute, and the plaintiff's action is not for the recovery of a penalty, but for the recovery of compensation for an injury for which the statute gives the right of action. It is not a statute establishing a rule of evidence, but a statute giving a substantive right of action. It extends the common-law liability of carriers of passengers by rail, and augments the right of action of the injured passenger, in the exact proportion that the common-law liability of a railroad company is enhanced."

4. Application of the Statute.

The application of the statute is not restricted to actions by the passengers injured; it is also to be applied in actions by third persons to recover damages sustained in consequence of an injury to a passenger, as, for example, in an action by a husband to recover damages for an injury to his wife. *Omaha, etc., R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921. And the statute is applicable in cases of injuries causing the death of a passenger. *Chicago, etc., R. Co. v. Zerneck* (Neb.), 82 N. W. 26, 17 Am. & Eng. R. Cas., N. S., 76; *Chicago, etc., R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343. But the application of the statute must be restricted to railroads, in the strict sense of the term, and cannot be applied to extend the liability of street railway companies beyond their common-law liability. *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 38 Am. St. Rep. 753, 20 L. R. A. 316.

5. Enforcement of the Statute by Other Than Nebraska Courts.

It has been held that the statute is neither a penal statute nor a statute establishing a rule of evidence, but a remedial statute giving a substantive right of action, and that, therefore, a right of action accruing thereunder may be asserted in any jurisdiction, if the court has jurisdiction of the subject-matter and can obtain jurisdiction of the parties. *Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541.

CANNON v. CLEVELAND, C., C. & ST. L. RY. CO.*(Supreme Court of Indiana, Nov. 26, 1901.)*

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BAKER, J. A demurrer for want of facts was sustained to appellant's complaint, in which she demanded judgment for \$10,000 for personal injuries. She refused to plead further, and judgment for appellee was entered. The ruling on the demurrer is assigned as error.

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used by the public, in common with said defendant, as a highway for foot passengers, and at all hours of the day the said way was so used; that on March 21, 1896, the plaintiff was carefully and rightfully passing on, over, and across said roadway to the place where she was employed; that before entering upon said strip of ground she looked and listened in both directions, but did not and could not hear or see any locomotive or car upon said strip or approaching the same; that after said plaintiff entered upon said strip, and continually while she was traveling thereon, until the time of the grievances hereinafter mentioned, she looked and listened in both directions for the approach of the train, but by reason of the curve in the track of said railroad she could not hear or see any locomotive upon said strip or approaching the same; that while said plaintiff was then and there proceeding along said way in a careful manner the defendant so negligently operated its road that she was wrongfully and negligently run against and permanently injured; that no bell was rung, no whistle was blown, nor was any warning of any kind given of the approach of said locomotive, nor was any watchman, gate, fence, or barrier of any kind on, upon, or across said strip of ground to notify persons using the same of the approach of a locomotive or train of cars; and that said locomotive approached said plaintiff from behind, and going in the same direction she was, so quietly and so quickly that she had no knowledge of its approach until she was struck by it and knocked down; and plaintiff says that said accident and injury were caused solely by the wrongful negligence of the defendant, and without any fault on the part of the plaintiff."

It appears that the alleged "highway for foot passengers" was upon appellee's premises, and extended longitudinally along and upon the tracks from one street to another. It was constructed by appellee for its own purposes and convenience. The public, in common with appellee's servants, used it as a footway. Appellee's servants presumably used it in the performance of their duties. The public used it for their own convenience as a short cut between streets. The way was used by the public with appellee's knowledge. The "consent" averred in the complaint, taking the intendments most strongly against the pleader, must be held to be only that consent which is implied from the public's use, without appellee's express objection after knowledge of the use, because no broader "consent" is directly alleged. Appellant did not go upon the premises to transact any business with appellee. She went purely for her own convenience, without invitation or inducement from appellee. There was no averment that the engineer saw appellant, and thereafter negligently ran the engine upon her. The right to recover is predicated upon appellee's failure to have watchmen and barricades, and to blow whistles and ring bells to keep appellant out of danger, without knowing that she was on the premises. The basis of

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the action is negligence. It was therefore incumbent upon appellant to show that appellee owed her the duty to exercise the particular care the omission of which is alleged to have been the direct cause of the injury. Do the facts make out such a case? It is not pretended that appellee expressly dedicated this longitudinal strip of its tracks to the public for a highway. The public's user of it was neither exclusive nor adverse, and, no matter how long continued, would not prove either an implied dedication or a prescriptive right. *Baltimore & O. S. W. Ry. Co. v. City of Seymour*, 154 Ind. 17, 22, 55 N. E. 953. The first stranger took upon himself the risk of all injuries short of those willfully inflicted. So did the thousandth stranger, unless it be held that appellee, although there was not the slightest impairment of its title and right of possession, was compelled to treat its own private land as a public highway where it was not. The first stranger did not have permission to travel along the tracks; the thousandth did have. But permission to do what? To do exactly what the first did without permission,—to travel along the tracks, assuming all hazards except willfulness. With respect to the last stranger, no more than to the first, could appellee be guilty of negligence, for to neither did appellee owe the duty of exercising care to keep him out of danger. The doctrine of *Lingenfelter v. Railway Co.*, 154 Ind. 49, 55 N. E. 1021, is applicable and controlling. The public, with the company's acquiescence, had created and used a footpath through the railroad yards. Near the path was an ash pit. Appellant charged that the company negligently obstructed the path by leaving a car standing directly across it, and that appellant, in the nighttime, was misled by the position of the car, and fell into the pit. It thus appears that negligence was claimed both with respect to the condition of the premises and the operation of the railroad. The court said: "Appellee, under the circumstances in this case, as the authorities affirm, owed no duty to appellant to refrain from obstructing the path by placing the car, as it did, upon its tracks situated on its own grounds, which were used in connection with the particular business in which it was engaged. Neither did the duty rest upon it, under the circumstances, to place signals of danger at or near the pit in order that a mere licensee, like appellant, passing over these grounds in the nighttime, might be warned, and thereby avoid falling into such pit." The facts in this case are quite similar to those in *Railroad Co. v. Tart*, 12 C. C. A. 618, 64 Fed. 823: "The decedent, accompanied by his son, was, when killed, walking on or dangerously near to the track of the company. He was not on or near any highway or street crossing. He was traveling along the right of way for his own convenience, without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed

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while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of way without interference or objection. He was traveling upon the defendant's right of way, not for any purpose of business connected with the railroad, but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license with its attendant perils. *Elevator Co. v. Lippert*, 24 U. S. App. 176, 11 C. C. A. 521, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer or trespasser. He was, at the time of the accident, in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of parties thus situated. Where both parties are equally in the position of right which is enjoyed by each independently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was willfully inflicted, or that it was caused by negligence so gross as to authorize the inference of willfulness." We approve the statement of the rule in 3 Elliott, R. R. § 1250: "It is held by some of the courts, however, that, if a railroad company licenses or acquiesces in the use of its track or premises by others, it must exercise reasonable care not only to avoid injuring them after they are discovered to be in danger, but also to keep a careful lookout to discover and avoid injury to all who may be expected to be

upon their right of way or premises. This rule, especially when applied in favor of those who walk along a railroad track between crossings, seems to us to be not only contrary to the weight of authority, but also impracticable, and in violation of the true principle that should govern such cases. If it be true, as generally conceded, that a licensee takes his license subject to the 'concomitant risks and perils,' he must surely take it subject to the use of the road in the manner in which it was used at the time the license was granted,—that is, subject to the running of trains in the ordinary manner, without any special reference to him; and he occupies, therefore, to this extent, substantially the position of a trespasser. In other words, the company owes him no duty of active vigilance to specially look out for and protect him, for he must know that his license is subject to all risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted, and that the company assumes no new obligation or duty. Indeed, it seems to us that he is bound to know that a railroad company has no power to license the use of its tracks in such a manner as to interfere with its duties to the public as a common carrier. If it owes a duty to every bare licensee to run its trains with reference to him, to look out for him, to signal, to slow up, and perhaps to stop, wherever it has reason to expect him, it can do little else; its trains cannot be on time, and the traveling public must suffer. It certainly is not obliged to patrol its tracks from one end to the other to keep off trespassers, and to prevent those who use it longitudinally from claiming a license on the ground of acquiescence. It seems to us, therefore, that the only duty which it owes to such persons, whether they are trespassers or bare licensees, is not to willfully or wantonly injure them, but to use reasonable care to avoid injury to them after their danger is discovered. It seems to us also that some of the courts beg the question when they say that the company must keep a lookout, and use care to discover and protect persons on the track where they may be expected, although not at a crossing or the like. Is the company bound to expect them at any such place, and run its trains with reference to them? Is not the assumption that such duty rests upon the company an undue assumption? The just and reasonable assumption would seem to be that they will not be on the track when trains are passing, or, if they are, that, as they take their license subject to 'concomitant perils,' they will look out for their own safety without special warning or charge by the company in the manner of using its road, and that it may act on this assumption until it discovers their danger." Expressions in some of our cases, as in *Railway Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155, on pages 66, 67, 112 Ind., pages 136, 137, 13 N. E., and pages 160, 162, 2 Am.

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St. Rep., which hold, or seem to hold, a contrary doctrine, are disapproved.

As no actionable negligence is disclosed by the complaint, it is unnecessary to consider the quality of appellant's care to save herself from injury.

Judgment affirmed.

DOWLING, J., did not participate.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* HALTOM *et ux.*

(*Supreme Court of Texas, Dec. 16, 1901.*)

[65 S. W. Rep. 625.]

Railroads—Negligence—Contributory Negligence—Failing to Prevent Injury—Instructions—Applicability to Evidence.*

Deceased, in attempting to get off cars on which he and other boys had been playing, while the cars were being moved in defendant's yard, fell, and was killed. Evidence tended to show that the boys, while on the car, were in view of the engineer and yard foreman, and that the latter looked towards them, but there was no evidence that defendant's servants directing the train's movements had knowledge of deceased falling under the cars until after the train had passed over him. The court instructed the jury that, though deceased was guilty of contributory negligence, defendant would be liable if its servants discovered his peril, and failed to use ordinary care to avoid the injury: *held* that, as the trainmen's knowledge that deceased was on a car of a slowly moving train was not sufficient to show knowledge of his fall and peril, the instruction was improper, for that rule can be applied only when defendant discovers deceased's peril in time to prevent the accident.

Error to court of civil appeals of Third supreme judicial district.

Action by J. W. Haltom and wife against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant brings error. Reversed.

T. S. Miller and Ramsey & Odell, for plaintiff in error.

Wear, Morrow & Smithdeal, for defendants in error.

WILLIAMS, J. Defendants in error recovered against the plaintiff in error the judgment of the district court, which was affirmed by the court of civil appeals (62 S. W. 800, 63 S. W. 338), for damages for the death of their son, Finley Haltom, which, they claimed, was caused by servants of plaintiff in error. Finley Haltom, at the time of his death, was nearly 18 years of age, of average intelligence, and familiar with the movements of trains around depots, and the dangers incident thereto. With an elder brother, he had been engaged in unloading coal from cars at the company's yard in Hillsboro, and on the day of his death had gone with his brother and other boys to the yard for the purpose of getting cars to

*As to the liability for injuries to trespassers on trains, see *Merrieles v. Wabash R. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 158, and note, 169 et seq.

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unload. While waiting for cars of coal to be placed at the chute to be unloaded, he and other boys were about and upon empty cars standing on the track, during which time employees of the company were engaged in switching cars about the yard. Shortly before the accident the boys started to go to the coal chute, and in doing so went upon a coal car in a train composed of flat cars and box cars which stood upon one of the tracks. They stopped upon one of the cars several minutes, during which time the switch engine was brought in to the south end of this train of cars, and removed one of them, and then returned to move the whole train southward. As the engine was coupled to the cars the second time, at some distance from the car upon which the boys were, all of them, except Finley, alighted from it, and walked towards the chute, with their backs to the moving train, and did not, according to their testimony, see how the accident occurred. When they looked back, Finley had fallen from the cars, and was across the rail, and being dragged by one of the moving cars. According to their testimony, he was dragged 70 or 80 yards before any car passed over his body. Another witness, who was at work a short distance east of the line of cars, states that, after the other boys had left the cars, Finley was seen by him running north on the flat cars, jumping from one to another, until he reached the end of a box car, when he tried to reach around its southeast corner to lay hold of the ladder on its side, and fell between the cars and across the rail. There is nothing in the record to contradict this account of the occurrence. The brother of deceased stated that as he left the car he saw Finley walking southward upon it, but the two statements are not in conflict as there was time for deceased to have turned back and acted as narrated by the other witness. While the boys, of whom there were four or five, were upon the car, some of them were playing and moving about, throwing pieces of coal and the like. The testimony of some of them is to the effect that they were in plain view of the engineer, and that he could have seen them if he looked in their direction. Between them and the engine, but on the ground, was the yard foreman, who, according to their testimony, looked first towards the engineer and then towards them, and gave signals to the former respecting the movements of the train. There was nothing to prevent him from seeing them. Both of these employees testify, in effect, that they did not see the boys upon the car, or know of their presence there. There is evidence, as before stated, that deceased was dragged for a long distance before the cars passed over his body. The witness before referred to who saw him fall was an employee of the railroad company, but had no connection with the switch engine or train. Except this employee, the first servant of the company who saw deceased after his fall was one Pelfrey, a car repairer, unless the evidence justifies the inference that the engineer or yard

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foreman saw him sooner. Pelfrey saw the body of the boy just as the last car passed over it, and at once gave notice to the yard foreman, who signaled the engineer to stop at once. Some of the evidence is addressed to the question whether or not the engineer stopped the train as quickly as possible after receiving the signal; but this becomes unimportant from the fact that the uncontradicted testimony shows that the whole train had passed over the boy before this notice was given. The trial court charged the jury, in effect, that, although deceased may have been guilty of contributory negligence in his conduct which resulted in his falling under the cars, the defendant would be liable if its servants discovered his peril, and failed to use ordinary care to avoid the injury and to save the deceased, and if from such failure his death resulted.

The prominent question now before this court is whether or not there was evidence to warrant the submission of such an issue, and we think it very clear that there was not. If we concede that the evidence that the boys, while on the car, were in plain view of the yard foreman and the engineer, and that the former repeatedly looked toward them, was sufficient to justify the jury in finding that one or both of these servants then saw them, this furnishes no evidence that either of such employees saw Finley Haltom when he fell, after the other boys had left the car, and the train had changed its position by moving forward, and Haltom had changed his by running back across other cars to the point where he fell; and the principle sought to be applied by the charge could only have application from the time of his fall. It was only then that danger began to which the rule applies. His fall was the occurrence which caused his death. The rule stated presupposes that his contributory negligence helped to cause the fall, and precludes his parents from recovering unless the defendant's servants, after discovering the peril brought about by such negligence, failed in their duty. When the servants saw the boys upon the car, if they did so, deceased was not in danger, or at least was not in any such danger as that produced by his subsequent conduct assumed to have been negligent. The principle under consideration is probably most often applied in cases where persons negligently upon the track are struck by moving engines or cars. In such cases it is held that it is not the mere discovery of a trespasser upon the track that gives rise to the duty defined in the charge, but it is the discovery or realization of peril to him which has such effect. So, in this case, mere knowledge that boys were on a car of a slowly moving train was not equivalent to knowledge that one of them would negligently run to another part of the train, and finally fall under the wheels. To make a case on this theory, there must be affirmative evidence, direct or circumstantial, tending to show knowledge of the fall. There is no such knowledge shown on the part of any employee except the laborer referred to above. His employment was

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not such as to make his failure to give notice that of the defendants, as he was not acting for it in operating or controlling the train, but in an entirely different sphere.

As to the contention that the engineer could have stopped the train sooner, it is enough to repeat that the uncontradicted testimony of the other employee, who first learned of the situation, shows that it was then too late for any effort to save the life of the unfortunate boy. Some effort was made in argument, by reference to positions of parties, distances, length, and speed of train and the like, to contradict this statement, but we fail to find in the evidence anything inconsistent with its truth; certainly nothing affording affirmative evidence of the fact which it was incumbent on plaintiff to prove.

The court erred in submitting an issue not presented by the evidence, and for this the judgments of the district court and of the court of civil appeals will be reversed, and the cause remanded. It becomes unnecessary to consider whether or not the charge upon the issue was correct, had the evidence raised it.

VANARSDELL'S ADM'R v. LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Dec. 20, 1901.*)

[65 S. W. Rep. 858.]

Duty to Trespassers on Track—Lookouts.*

It was not the duty of the servants in charge of a train approaching a bridge to keep a lookout to see whether any person was trespassing on the bridge, but it was their duty, if they discovered the peril of a trespasser, to use all reasonable efforts to avoid injuring him.

Testimony to Be Considered on Motion for Peremptory Instruction.

For the purpose of sustaining a motion by defendant for a peremptory instruction at the conclusion of all the testimony, only the testimony for plaintiff can be considered.

Question for Jury Whether Trespasser on Bridge Was Seen in Time.

Where there was testimony tending to show that the servants in charge of a train approaching a bridge could have seen a trespasser on the bridge at a distance of about 960 feet from the bridge, that the train could have been stopped within that distance, and that the engineer or fireman was seen to look from the cut toward the bridge at a distance sufficient to enable the train to be stopped, or its speed so materially slackened as to enable the trespasser to escape, the question whether the trespasser was in fact seen in time to enable the servants in charge of the train to avoid the injury was for the jury.

Evidence—Photographs.

Photographs were admissible as evidence for defendant.

Evidence as to within What Time Another Train Could Be Stopped.

Evidence as to the stopping of a train, running at the same speed as the train which struck plaintiff's intestate, between a curve and

*As to the duty owing to trespassers on track, see *Egan v. Montana Cent. Ry. Co.* (Mont.), 20 Am. & Eng. R. Cas., N. S., 72, and footnote.

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the bridge, was admissible; the length of time in which a train could be stopped between those points being material in determining the negligence of defendant.

Opinion Evidence as to Time within Which Train Could Be Stopped.

The opinion of a witness as to the time in which a train could be stopped, if based on knowledge and observation, was admissible.

Burnam and Du Relle, JJ., dissenting.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Action by the administrator of Mary Vanarsdell against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Reversed.

Robert Harding, John W. Rawlings, and Emmet V. Puryear, for appellant.

C. R. McDowell and J. W. Alcorn, for appellee.

GUFFY, J. This action was instituted in the Boyle circuit court by James P. Harbison, Jr., administrator of the estate of Mary Vanarsdell, against the appellee, seeking to recover judgment for the sum of \$30,000 damages for the death of his intestate, caused, as alleged, by the gross negligence of appellee. It is substantially alleged in the petition that the defendant was engaged in operating and running its freight train upon and over its track of railroad in Lincoln county, and by its gross negligence at said time and place in failing to stop said train, and by its gross negligence in the management and operation of said train, ran the same over and upon plaintiff's intestate, thereby horribly mangling and injuring her body and destroying her life. It is also substantially averred that the defendant became aware of her presence on its track and bridge, and of her peril and danger from said approaching train at said time and place, in ample time to materially slacken the speed of same, and by so doing could have avoided injuring her and destroying her life; but the defendant failed and neglected, after it became aware of her presence upon its track and bridge, to either slacken the speed of said train, and failed to stop same, and by its gross negligence in the management of the train plaintiff's intestate was injured, and her life destroyed, and plaintiff was thereby damaged in the sum of \$30,000, and is entitled to recover punitive and compensatory damages in the sum of \$30,000. The answer admits the killing of plaintiff's intestate by its said train on or about the time stated. It is substantially alleged in the answer that the killing occurred on a bridge which was a part of defendant's railway, and which intestate was at the time attempting to cross. It is, however, denied that the said train was by any negligence run over plaintiff's intestate; that it is true that the train was not stopped before running over said intestate, but it is denied that it could have been stopped in time to prevent its running over and upon said intestate after and when those operating same discovered

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the place at which said intestate was, and the danger and peril to her from said train. It is denied that there was any failure to slacken the speed of said train. It is further denied that it or those in operation of said train became aware of her presence on its said track and bridge in time to have materially slackened the speed of same, so as to have stopped the train before reaching the point where she was, or that it could have avoided said injury, or that its employees were guilty of any negligence whatever, and that the said intestate was killed by reason of any negligence of the defendant or the operators of said train. It is further alleged that said intestate was run over and upon and killed by said train when she was upon a bridge, a part of defendant's railroad track, and which bridge was across the stream known as "Knob Lick," and was used for the passage of said train, and upon which bridge said intestate had entered without any right whatever, and said injuries and the loss of life by her was suffered by her own negligence, and without any negligence of defendant. The reply controverts so much of the answer as pleads negligence upon the part of intestate. At the conclusion of plaintiff's evidence the defendant moved the court to instruct the jury peremptorily to find for the defendant, which motion was overruled, and defendant introduced its proof, and at the conclusion thereof the defendant moved the court to peremptorily instruct the jury to find for the defendant, which motion was sustained; and thereupon the jury returned a verdict for defendant, and judgment was entered accordingly.

The grounds relied on for a new trial are—First, because the court erred in giving the peremptory instruction at the conclusion of the testimony of both parties; second, because the verdict is contrary to the law and evidence; third, error of the court in refusing to permit O. J. Thurmond to testify in rebuttal; fourth, refusal to permit Jennie Hooper to testify in chief; fifth, error in refusing to permit Phillips and Jones to testify in behalf of plaintiff; sixth, because the court permitted witness Fox, who testified for defendant, to make part of his testimony photographs, called "exhibits," etc. Plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

The testimony in this case for the plaintiff shows that the intestate and four other children, their ages ranging from perhaps 16 down to 8 years, were crossing Knob Lick on defendant's railroad bridge; that the intestate was perhaps about 12 years old; that when she and her escort, Becker, were perhaps about half way across the bridge, which was shown to be 160 feet long, she and the others became aware of the approach of the defendant's train. The three other children were a little ahead of the intestate, and made their escape, without injury, from the bridge. The evidence tends to show that the intestate became excited, and fell through between the ties of the bridge, the plank or timber by the side of the

rails being quite narrow. Her escort remained with her, and pulled her up from between the ties perhaps twice, if not oftener, but the train struck her, and caused her immediate death; also knocked her escort off, and injured him.

It must be conceded that the intestate was a technical trespasser,—or, in other words, she had no lawful right to use the bridge as a passway,—and that appellee was not under any obligations to be looking out to see if she was upon the bridge. But it is also a well-settled rule of law that if the defendant, its agents or employees, in charge of the train, discovered the peril or danger of the intestate, it was its duty to use all reasonable efforts to avoid injuring her, and if they failed to do so the plaintiff would be entitled to recover. If, however, the defendant used all reasonable efforts to avoid the injury after discovering her peril, the verdict should have been for defendant.

It appears from this record that the court refused to give a peremptory instruction at the conclusion of plaintiff's testimony, but after hearing that of defendant did give the peremptory instruction complained of. We shall not consider the testimony introduced by the defendant, for the reason that it was not proper to consider it upon the motion for a peremptory instruction. We shall not intimate an opinion as to whether defendant's testimony was convincing one way or the other, because it should have had no weight, even if it tended to show that plaintiff ought not to recover; for if a court can hear both sides of a controversy, and from that determine whether a plaintiff can recover or not, and instruct the jury accordingly, then the court would be usurping the functions of the jury, and, in effect, abolish a trial by jury.

The testimony in this case tends to show that the intestate was within about 10 feet of the west end of the bridge when struck by the train, it being the apparent object of the parties to cross over to the west side of the creek. Without going into a detailed recital of plaintiff's testimony, it may be stated that the testimony tended to show that those in charge of the train could have seen the intestate at a distance of about 960 feet from the bridge, and some testimony was introduced tending to show that the fireman or the engineer was seen to look out the cab toward the bridge at a distance therefrom sufficient to have enabled the train to be stopped, or its speed so materially slackened as to have enabled the intestate to escape the injury. Some testimony was introduced tending to show that the train might have been stopped within 209 yards, or, at least, in less than 960 feet. The evidence also establishes that for a considerable distance from the east end of the bridge is an up grade, not a very heavy one. The train was a freight, having perhaps 15 or 18 cars, and the testimony conduces to show that it was running about 20 or 25 miles an hour as it approached the bridge. With these facts established, and the circumstances surrounding the case, the jury

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would have been entitled to have considered all this testimony and all the facts, and would have a right to have concluded that the defendant's agents did see the intestate in time to have avoided the injury. The jury would have had the right to consider the distance between the train and the bridge at the time defendant could, if its agents had looked toward the bridge, have seen the intestate, and the jury would have been authorized to conclude that defendant saw the peril of intestate, but assumed that she would make her escape from the bridge in safety, which manifestly she would have done had she not fallen between the ties, and for that reason the defendant did not use such reasonable care to check the rate of speed it would have done had the intestate had no chance of escape.

It is not for a moment to be presumed that the defendant knowingly and intentionally ran its train upon the intestate. We are not inclined to the opinion that the court erred to the prejudice of defendant as to the admission of testimony, nor do we think that the court erred to plaintiff's prejudice in admitting the testimony of Fox and his photographs. We think the court erred in not admitting the testimony of Thurmond as to the stopping of a train going 20 or 25 miles an hour between the curve and the bridge, for the reason that the length of time in which a train could stop between the curve and the bridge was material in determining the negligence of defendant. If S. M. Phillips, from his knowledge of the stopping of trains, would have fixed the length of time, based upon knowledge and observation, he should have been allowed to so state. His mere opinion, if not based on knowledge and observation, would not have been competent. The testimony of Jones should have been admitted.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial upon principles consistent with this opinion.

BURNAM and DU RELLE, JJ., dissenting.

ST. LOUIS & S. F. R. CO. v. BOARD OF COM'RS OF LABETTE COUNTY *et al.*

(*Supreme Court of Kansas, Division No. 1, Dec. 7, 1901.*)

[66 Pac. Rep. 1045.]

Taxation—Recovery of Excess Where Illegal Discrimination against Railroad.*

Where tax assessors discriminate against a railroad by assessing its property at its full valuation, while private property is only assessed at one-fourth its valuation, and the railroad pays such illegal taxes under protest, it is entitled to recover the taxes so paid.

*See generally, 7 Rap. & Mack's Dig. 998 et seq.; 25 Am. & Eng. Enc. Law 465 et seq.

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Same—Same—Pleading.

Where it appears from the averments of the petition in such action that plaintiff claims that its property has been assessed at its actual value, and private property at one-fourth its value, an allegation that plaintiff's property was assessed at double its value does not render the petition demurrable.

Same—Same—Same—Parties.

Where a railroad brings action against a county treasurer and county commissioners to recover illegal taxes paid under protest, and a portion of such taxes is county taxes, the entire petition is not subject to demurrer for want of parties, in failing to name townships, cities, and school districts as parties, as the necessary parties to an action to recover the taxes paid for county purposes are before the court.

Demurrer.

Where a petition states a valid cause of action as to a part of the relief demanded, a judgment sustaining a demurrer generally is erroneous.

Error from district court, Labette county; A. H. Skidmore, Judge.

Action by the St. Louis & San Francisco Railroad Company against the board of county commissioners of the county of Labette and another to recover taxes illegally levied and collected. From a judgment in favor of defendants, plaintiff brings error. Reversed.

Argued before DOSTER, C. J., and JOHNSTON, SMITH, and ELLIS, JJ.

J. W. Gleed and John L. Hunt (Gleed, Ware & Gleed and D. E. Palmer, of counsel), for plaintiff in error.

W. S. Hyatt, for defendants in error.

PER CURIAM. This was an action to recover taxes alleged to be illegal, and which were paid by the railroad company under protest. The petition of the railroad company, in substance, averred that the assessing officers of Labette county assessed the property in the county other than railroad property at one-fourth of its actual value, while railroad property was assessed at its actual value, and that it was done by the officers upon an understanding and with the intent to favor the owners of property other than railroad property, and to discriminate against the owners of railroad property. It was alleged that by reason of this illegal discrimination the railroad company was obliged to pay taxes, though under protest, at a rate four times higher than the rate paid by other owners of property in the county.

The defendants demurred to the petition upon the grounds that plaintiff had no legal capacity to sue, that there was a defect of parties defendant, and that the facts stated were insufficient to constitute a cause of action. The demurrer was sustained, and of this ruling complaint is made. The facts alleged bring the case within *Chicago, B. & Q. R. Co. v. Board of Com'rs of Atchison Co.*, 54 Kan. 781, 39 Pac. 1039, where it was held that the railroad company was entitled to

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relief. Defendants attempt to distinguish the cases because in one part of the petition herein it is stated that the railroad property was assessed at more than twice its real value. Other averments, however, are to the effect that such property is assessed at its actual value, and it is plain that the pleading was drawn on that theory.

The only other objection urged is that there is a defect of parties defendant. The county treasurer and the board of county commissioners are named as defendants, and it is claimed that the townships, cities, and school districts of the county are necessary parties to a proceeding to declare taxes levied and collected illegal, and for their recovery back on the ground of illegality. So far as the county taxes illegally levied and collected are concerned,—and they form a considerable part of the recovery sought,—the necessary parties were undoubtedly before the court, and therefore the demurrer should not have been sustained. We need not decide at this time whether cities, townships, and other municipalities are necessary parties before a recovery can be had for taxes illegally collected for such municipalities. If the taxes so wrongfully collected have been distributed among such municipalities, or for any other reasons the municipalities should be brought into court in order to protect their interests, they can be made parties when the case is remanded for trial.

The demurrer having been sustained generally, without specifying the grounds of the ruling, and as the facts were sufficient and parties sufficient, so far, at least, as the county taxes are concerned, the ruling must be held to be erroneous, and therefore the judgment will be reversed, and the case remanded for further proceedings.

BELL v. SOUTHERN RY. CO.

(*Supreme Court of Mississippi, Dec. 19, 1901.*)

[30 So. Rep. 821.]

Railroads—Injuries to Licensee—Negligence—Contributory Negligence—Questions for Jury.*

Plaintiff was unloading coal from a car on defendant's side track placed there for that purpose. After satisfying himself that no engine was attached, plaintiff backed up his wagon, and while so doing his team became frightened, and he stepped in front of them. At that moment he heard an engine hit the train, and the coal car struck the wagon, frightening the team so that they ran over plaintiff. He could not see the engine before the collision, and received no warning from defendant's servants: *held*, as the plaintiff was at the car on the implied invitation of the defendant, that defendant's negligence and plaintiff's contributory negligence were questions for the jury.

Calhoon, J., dissenting.

*As to liability for injuries to licensees at depots, see *Cincinnati, H. & D. R. Co. v. Aller* (Ohio), 21 Am. & Eng R. Cas., N. S., 304, and note, 309 et seq.

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Appeal from circuit court, Leflore county; F. E. Larkin, Judge.

Action by William A. Bell, by next friend, against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Appellant, who was plaintiff in the court below, by next friend brought this action of trespass on the case against appellee, the defendant below, to recover of it damages alleged to have been sustained by plaintiff by reason of the negligence of defendant's employees in backing a train of cars, from which plaintiff at the time of the injury was unloading some coal, thereby causing the mules, which were hitched to the wagon into which the coal was being loaded, to become frightened, and to run over plaintiff and injure him. The evidence in record shows that the car of coal had been placed on a side track of defendant's in Greenwood, Miss., at the request of one C. E. Wright, a dealer in coal at that place, for the purpose of being unloaded; that the father of plaintiff had purchased some coal from Wright, and had been instructed by Wright to unload the car of coal on defendant's track, which he directed plaintiff to do. Plaintiff testified that he and a negro man went to work unloading the car, backing the wagon up to it for that purpose, and throwing the coal from the car into the wagon; that they had hauled five loads during the day, and that the car had not been moved, so far as he knew, during the day; that the car was standing about the middle of train of 24 cars, and that they backed the wagon up to the car to put on the sixth load; having satisfied himself that there was no engine attached to the train, he started to get up on the car, when he saw that a train was going to pass on the main line of the railroad; that he got down in front of the mules which were being driven to the wagon, and stood there until the train passed; that he then started back to the wagon again, and saw that the mules were getting scared; that he got in front of them again, when he heard an engine hit the cars, and the car he was unloading; that the cars hit the wagon, and knocked it around, frightening the mules so that he was unable to hold them, and that they ran over him, knocked him down, and broke his arm and otherwise injured him; that he did not see the engine that struck the cars on the side track until the collision occurred; and that he had no notice or warning by appellee that such action would be taken. The evidence in the case also shows that appellant could not have seen, from where he was standing at the time of the collision, any engine or cars that might have been backed in on the side track, from the direction from which they did back. After the evidence for plaintiff was all in, defendant moved to exclude all the testimony introduced, because of the variance between the proof and allegations of the declaration, and because the proof failed to make out a case against defendant, which motion was sustained by the

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court, and a peremptory instruction was granted for defendant. There were verdict and judgment accordingly. From this judgment plaintiff appeals.

Saml. L. Gwin, for appellant.

Catchings & Catchings, for appellee.

WHITFIELD, C. J. The appellant was where he was when injured by the implied invitation of the appellee. Under all the testimony, we think the case should have gone to the jury. Whether the company was guilty of negligence, and whether he himself was guilty of contributory negligence, were questions of fact which a jury should have passed upon. So many questions are integrated usually with the solution of the question of negligence—it is so necessary to carefully examine all the circumstances making up the situation in each case—that it must be a rare case of negligence which the court should take from a jury. We think this is not that sort of a case.

Reversed and remanded.

CALHOON, J., dissenting.

CAMPBELL v. CONSOLIDATED TRACTION CO.

(Supreme Court of Pennsylvania, Jan. 6, 1902.)

[50 Atl. Rep. 829.]

Presumption of Negligence from Injury to Wagon Caused by Trolley Car Moving Backward down Grade.*

Plaintiff's evidence showed that his wagon was standing on one of defendant's tracks, and that in front of him were two cars, and that, as the second car moved up a grade, the trolley wheel slipped, and the car slipped backward and struck the car back of it, when either the force of the collision drove the rear car against the wagon, or the motorman of that car moved it backward to avoid a collision: *held*, that the evidence raised a presumption of negligence on the part of defendant, and made it incumbent on it to show due care.

Negligence—Question for Jury.

The question whether defendant had exercised due care was one for the jury.

Appeal from court of common pleas, Allegheny county.

Action by Charles J. Campbell against the Consolidated Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Knox & Reed and J. H. Beal, for appellant.

Robert T. Reineman, for appellee.

FELL, J. The plaintiff was seated in a wagon which was standing on the track of the defendant's road on Fifth avenue, near Smithfield street, Pittsburgh. In front of him were two

*As to the burden of proving negligence, see generally, *Louisville & N. R. Co. v. Victory* (Ky.), 12 Am. & Eng. R. Cas., N. S., 538, and note, 543 et seq.; 6 Rap. & Mack's Dig. 821 et seq.

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cars, the nearest being about 10 feet in advance of his horses, and a car was back of him, close to his wagon. On another track a car stood to his left, and to his right the street was crowded with people, so that he was completely hemmed in. As the second car in front of him moved across Smithfield street on an ascending grade, the trolley wheel slipped from the wire, and the car stopped, and then slipped backward about 60 feet, and struck the car back of it. Either the force of the collision drove the rear car against the plaintiff's horses and wagon, or the motorman of that car moved it backward to avoid a collision.

The proof of these facts established a *prima facie* case for the plaintiff. He was not bound to go further, and show, by affirmative evidence, that the accident was an avoidable one. He was in a place of apparent safety, and had no reason to apprehend danger from a backward movement of the cars. In the ordinary course of events such a movement was not to be expected. No extraneous cause interfered with the defendant's control of its cars. The loss of control may have been a pure accident, or the result of mismanagement, or of defective appliances. If the slipping of the wheel was an accident which could not have been guarded against, the question would arise whether proper means had been provided to arrest the movement of the car in such an emergency; and, if so, whether proper use had been made of them. The case was one in which the proof of the accident and the attendant circumstances gave rise to a presumption of negligence, and made it incumbent on the defendant to show that due care had been used. Whether this was shown was necessarily for the jury.

The judgment is affirmed.

SOUTHERN RY. CO. *v.* CROWDER.

(*Supreme Court of Alabama, May 9, 1901.*)

[30 So. Rep. 592.]

Care Due Passenger on Freight Train.

A carrier of passengers is bound to exercise the highest degree of care to avoid injury to those whom he undertakes to carry as passengers, and for injuries resulting from a failure of duty in this regard the carrier is liable; and this rule applies without regard to the vehicle used for conveyance.

Same.

A railroad company that carries passengers on one of its freight trains is required to exercise the highest possible degree of care and diligence to which such trains are susceptible.

Same—Assumption of Risk by Passenger.

Persons taking passage on a freight train by permission of the common carrier assume no risks or discomfort which are inherent in the management and operation of freight trains which are wanting in care for passengers; nor does the fact that such train is composed

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mainly of freight cars lessen the degree of care resting upon the carrier, which requires of it all care available for the passenger's safety consistent with the practical operation of said train.

Witnesses—Right to Explain Absence of Witness.*

In an action against a railroad company by a passenger to recover damages for personal injuries, it is competent for the plaintiff, after she had been made to testify on cross-examination that the physicians who treated her were not attending the trial, to explain the absence of these physicians, and to state that she had tried to get one of the physicians to attend the trial.

Injury to Passenger—Evidence as to Construction of Car Part of Res Gestæ.

In an action against a railroad company by a passenger to recover damages for personal injuries sustained while seated in one of the cars of the defendant, testimony describing the car's construction and furnishing is admissible in evidence as a part of the res gestæ, tending to illustrate the manner of plaintiff's fall and injury.

Witnesses—Cross-Examination to Show Payment of Expenses by Defendant.

In an action against a railroad company by a passenger to recover damages for personal injuries alleged to have been caused by the negligence of defendant's employees, it is permissible for the plaintiff to show upon cross-examination of one of the defendant's witnesses that the defendant paid his way to the place of the trial, and was to pay his expenses.

Excessive Verdict.

In an action against a railroad company by a passenger to recover damages for personal injuries, where it is shown that by reason of the acts complained of the plaintiff sustained serious hurts, that the bone in her hip joint was fractured, which would result in permanent injury to plaintiff and in the impairment of her general health, and materially affect the use of her leg, causing it to stiffen and shorten, the assessment of \$15,000 damages by the jury cannot be said to be excessive.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Mary B. Crowder against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action was brought by Mary B. Crowder, the appellee, against the Southern Railway Company. The complaint claims \$30,000 damages for personal injuries sustained by her while a passenger on a train operated by the defendant company, which injuries were alleged to have been caused by reason of the negligence of the defendant and its employees. The defendant pleaded the general issue and contributory negligence on the part of the plaintiff. Upon these pleas the trial was had. Upon the trial the following facts were disclosed: The plaintiff, a married woman, 58 years of age, was riding in the caboose of defendant's freight train on her way from Decatur, Ala., to Huntsville, Ala., and as the train was slowing up for a stop at Madison station, about 10 miles from

*As to what has been held the proper amount to allow as damages for loss of legs or feet, see *Kalfur v. Broadway Ferry & M. Ave. R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 850, and extensive note, 851 et seq.

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Huntsville, she fell or was thrown from the chair in which she was sitting to the floor, and received injuries to her hip, causing a fracture or dislocation of the hip joint. The train was in the habit of carrying passengers in the caboose, which was an ordinary freight caboose primarily fitted up for the conductor's and crew's use and occupancy, and was divided into three compartments, the middle compartment being provided with rude benches against the wall, and a chair or two. The plaintiff was seated in one of these chairs in the rear of the rear compartment, when, as she claims, she was thrown to the floor by a violent jar or jerk of the train. It was admitted that she fell from the chair to the floor as the train was stopping for Madison station, and received an injury to her hip, but it is disputed that there was any jarring or jolting of the train of any unusual force other than is ordinarily incident to the stopping of freight trains. This train was composed of 30 cars, engine, tender, and caboose, the caboose being the hindmost car in the train. The principal question at issue was as to the character and extent of the jar, jerk, or jolt, or checking up of the train as it approached the station, which jar or checking was alleged to have caused the plaintiff to fall. The plaintiff contended, and her evidence tended to show, that there was evidence of negligence on the part of the defendant or its conductor, and, further, that the conductor was negligent in not furnishing the plaintiff a better seat or better accommodations than were furnished. The evidence for the defendant tended to show that there was no negligence in this respect, and it was further contended by the defendant that as to such a train upon which the plaintiff was a passenger the law did not require it to furnish its passengers any better, safer, or different accommodations than were usually or ordinarily found on other cabooses under similar circumstances and under like conditions. The other facts of the case necessary to an understanding of the decision of the present appeal are sufficiently stated in the opinion.

Upon the cross-examination of a witness who was introduced by the defendant the plaintiff's counsel asked him the following question: "Did the defendant pay your way down here?" The defendant objected to this question upon the ground that it called for immaterial evidence. The court overruled the objection, and the defendant duly excepted. The witness answered that the defendant gave him a pass, and that he believed the defendant was to pay his expenses. Upon the introduction of all the evidence the defendant requested the court to give to the jury, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (11) "The jury have the right to test all the evidence in the light of common sense and common experience, and if, in the light of their common sense and common experience, the evidence does not reasonably satisfy their minds that the jar or jolt which caused the plain-

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tiff to fall from her chair was greater than is ordinarily incident to the prudent management of a freight train, they cannot find a verdict against the defendant, so far as negligence in that particular is charged." (12) "Under the evidence in this case, there can be no verdict against the defendant based on any charge of wrong or negligence of the conductor." (13) "Under the evidence in this case, I charge you, gentlemen of the jury, as a matter of law, that the conductor was guilty of no wrong or negligence of which this plaintiff can complain." (14) "It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of a jar and jerk incident to the starting and stopping of trains, and that such jars and jerks are, as a rule, greater on freight trains. A passenger on such train assumes the ordinary risk and discomfort incident thereto; and if the train is managed with such care and prudence, by skillful and prudent employees, as to subject him only to the risk and discomfort thus incident, the railroad company would not be responsible for any accident resulting therefrom." (15) "I charge you, gentlemen of the jury, as a matter of law, that the company was under no legal obligation to furnish or provide any better or safer accommodations for its passengers than the evidence in this case shows were furnished." (16) "I charge you, gentlemen of the jury, as a matter of law, that you cannot find a verdict for the plaintiff based on any omission of defendant to provide or furnish the plaintiff a better or different kind of seat or chair, or a better or different place or compartment to sit in." (17) "I charge you, gentlemen of the jury, that under the circumstances of the case the plaintiff was bound to accept the accommodations furnished her just as she found them, or as provided for her, there being nothing in the case to show that she was exposed to any obvious and unnecessary danger by reason of such accommodations." (18) "Gentlemen of the jury, I charge you that the only issues of fact before you, apart from the question of damages, are: First, whether or not the jolt or jar imparted to the caboose, and which caused the plaintiff to fall, was unusual or extraordinary, as compared with the ordinary jolts or jars incident to the operation of freight trains; second, whether or not the plaintiff herself was guilty of any negligence proximately contributing to her injury. And if you believe from the evidence that the jar or jolt which caused the plaintiff to fall from her chair was not unusual or extraordinary, as herein defined, your verdict should be for the defendant." There were verdict and judgment for the plaintiff, assessing her damages at \$15,000. The defendant made a motion for a new trial. The grounds of this motion were that the verdict was contrary to the evidence and contrary to the law, and that the verdict was excessive. This motion was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the

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several rulings of the trial court to which exceptions were reserved.

Smith & Weatherly, for appellant.

N. L. Miller and Lane & White, for appellee.

SHARPE, J. Damages are claimed for injuries received by the plaintiff while she was traveling from Decatur to Huntsville as a passenger on a train used by defendant for carrying passengers and freight. The car used for passengers was a caboose attached to the rear end of the train. The conductor provided for plaintiff, in the rear end of the caboose, a chair, which, in testifying, she described as being narrower than an ordinary chair, without arms, and having a low back, and a hard, wooden bottom. Plaintiff's evidence tends to prove that while the train was being moved about a way station she was thrown from her seat and hurt by a violent jerk of the train. The jury having been instructed affirmatively in favor of the defendant as to count 4 of the complaint, it is presumed that no recovery was had thereon, and therefore rulings on pleadings pertaining to that count are immaterial. The law, from public policy, holds carriers of passengers to the highest degree of care to avoid injury to those whom it undertakes to carry as passengers, and for injuries resulting from a failure of duty in that regard the carrier is liable. This rule is general, and applies without regard to the vehicle used for conveyance, though it does not hold the carrier as insuring the same degree of safety or convenience on all occasions or on all kinds of vehicles. It is common knowledge that trains used exclusively for the carriage of freight have not appliances and furnishings so well adapted to graduating their movements as do passenger trains, and that jolts and jars may be allowed to occur thereon which would be harmless to freight, and yet be dangerous to passengers if passengers were being carried. It may also be a fact that such jolts are ordinarily incident to, and are not inconsistent with, prudent management of a train used exclusively for freight. Therefore it cannot be assumed as a matter of law that what would be prudent management of a freight train is a test of what would amount to prudence in the operation of mixed trains, employed for the carriage of both passengers and freight. Those taking passage on such a train assume no risk of conduct on the carrier's part lacking in care for passengers, nor does the fact that the train is composed mainly of freight cars lessen the degree of care resting on the carrier, and which requires of it everything which, consistently with the character and practical operation of such trains, is available for the passenger's safety. Elliott, R. R. § 1629; Railroad Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898. The fact that injury to a passenger has resulted from an act or omission of carrying by a railroad company raises a prima facie presumption of negligence on the part of the company, and casts on it the burden of disproving the pre-

sumption. From the evidence in this case it appears that plaintiff's fall may have been attributable to combined causes, viz. a jolt of the train and insufficiency of the chair to support her against such jolt. It may be that a seat constructed to withstand and sustain its occupant against such jolts would have rendered them harmless. Whether, in this instance, the defendant fulfilled its duty in respect of the seat furnished or in respect of moving the train were questions of fact for the jury to determine in view of the fact that the train was not for freight exclusively, but was used for and was actually carrying passengers, whose safety defendant was bound to conserve by adopting, if necessary, methods different from those used for the carriage of freight. Like principles were declared in the case of *Railway Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467,—a case involving a similar accident on a mixed train. In each of charges 11 and 14 refused to defendant it is wrongly assumed that the train in question was a freight train merely. Charge 14 is bad for the further reason that it is argumentative in respect of the comparison it makes between passenger and freight trains, and also because it is not common knowledge, as is therein in effect asserted, that there is always more or less of a jar or jerk incident to the starting and stopping of passenger trains. Neither of the other refused charges was in accordance with the principles above stated. Their defects will appear without special mention. There was no evidence from which contributory negligence could have been imputed to plaintiff.

Rulings on evidence, so far as they are here complained of, involve no reversible error. After plaintiff had been caused by cross-examination to say the physicians who treated her were not attending the trial, it was permissible for her to explain the absence of those physicians, to rebut inferences that might have been drawn against her from the fact of such absence. The matter called for by the question, "Did you try to get him [Dr. Chapman] to come here?" was not irrelevant, and the court will not be put in error for overruling the objection made, which, being merely general, did not challenge the form of the question.

As part of the *res gestæ* tending to illustrate the manner of plaintiff's fall and injury, the testimony describing the car's construction and furnishings was properly admitted.

Payment by a party of expenses accruing on the attendance of a witness affords the witness a pecuniary benefit beyond what the law provides for his compensation. Though the fact of such payment may impute no improper motive to the party, yet it may afford some ground for inferring a bias in the witness' testimony, and is therefore admissible in evidence. *Railroad Co. v. Johnston* (at present term) 29 South. 771.

The only remaining question meriting special consideration is that raised by the motion for a new trial respecting the amount of damages assessed. The elements of damages in

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such cases are not such as to furnish any definite rule by which the jury can be guided in fixing the amount to be recovered. Here they included such suffering and physical impairment as had come or would probably ensue to the plaintiff as the proximate result of negligence averred and proven. Evidence which was undisputed tends to show that by her fall plaintiff sustained serious hurts, among which was a fracture of a bone in the hip joint, in the treatment of which she was for several weeks kept prostrate with a weight suspended to her foot, and that this hip injury has resulted in impairment of plaintiff's general health, and a permanent stiffening and shortening of her leg to an extent which will henceforth deprive her of its natural use. The jury was authorized to award for recovery a sum which would furnish reasonable compensation for these injuries and the suffering naturally attendant thereon. The law committed the ascertainment of that sum to the jury's discretion, and to the court the duty in that regard only of confining the exercise of that discretion to reasonably proper and practicable limits. In the record we do not find warrant for declaring that the trial court erred in determining those limits were not exceeded. The judgment will be affirmed.

LOUISVILLE & N. R. CO. v. HARMON.

(*Court of Appeals of Kentucky, Oct. 1, 1901.*)

[64 S. W. Rep. 640.]

Burden of Proving Negligence of Plaintiff Where It Is Denied That She Was a Passenger.

There being no presumption that plaintiff was injured by the negligence of defendant railroad company unless she was a passenger at the time she was injured, the denial by defendant that such was the fact placed the burden of proof upon plaintiff, and she was entitled to the concluding argument to the jury.

Liability for Injury to Alighting Passenger.*

If the servants in charge of the train on which plaintiff was a passenger failed to hold it long enough to enable her to alight in safety, and she was injured while attempting to do so, or, even though the train was held long enough to enable her to alight in safety, yet if the servants in charge of the train, with knowledge of the fact that she was attempting to alight, caused the train to start, thereby causing her injury, the company is liable.

Liability for Injury to Passenger in Another State—What Law Governs.†

An action against a railroad company to recover damages for an injury received by plaintiff, while a passenger, in another state, is governed by the law of that state as to the degree of care required, and in such an action it was proper to instruct the jury that defendant was bound to use "the utmost human care and foresight known to prudent and careful men," where it was alleged, and not denied, that by the law of the state where the injury occurred defendant

*See *Cooper v. Georgia, C. & N. Ry. Co. (S. Car.)*, 22 Am. & Eng. R. Cas., N. S., 667, and foot-note.

†See generally, *Chicago & E. I. R. Co. v. Rouse (Ill.)*, 12 Am. & Eng. R. Cas., N. S., 706, and notes, 711 et seq.; 9 Cent. Dig., col. 1203.

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undertook to use that degree of care; and it was also proper to give to the jury the law of that state as to contributory negligence as admitted by the pleadings.

Instructions.

Defendant cannot complain of an instruction telling the jury that plaintiff was entitled to recover if the servants in charge of the train "moved and jerked" same while plaintiff was attempting to alight, as the court by other instructions told the jury that plaintiff could not recover unless defendant failed to hold the train long enough to enable her to alight in safety, or moved it knowing that plaintiff was attempting to alight.

Appeal from circuit court, Warren county.

"Not to be officially reported."

Action by Sarah C. Harmon against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Mitchell, H. W. Bruce, Edward W. Hines, and Walker D. Hines, for appellant.

Proctor & Herdman and Jno. W. Ray, for appellee.

PAYNTER, C. J. The appellant carried the appellee as a passenger from Nashville to Springfield, Tenn. The appellee claims that when the train arrived at Springfield it stopped to permit passengers for that station to alight; that it did not give them sufficient time to alight in safety; that when she was in the act of getting off of the train, in the presence of the conductor, the signal was given by him to start; that it did start, and threw her from it, resulting in her serious and permanent injury, for which she sought damages. It is not necessary to state the character and extent of her injury, for, if she was entitled to recover at all, the amount of the verdict is not excessive, considering the permanent and serious nature of her injury. There is a platform at Springfield upon which passengers alight on the opposite side of the railroad track from the depot, it being between the railroad tracks and the town. The appellee and her witnesses testified that while she was endeavoring to alight from the train, in the presence of the conductor, it not having remained long enough at the station to permit her to alight in safety, the conductor had it start, and she was thrown to the ground, causing the injury complained of. She and some of her witnesses testified that as she started down the steps to alight on the platform provided for passengers, the conductor halloosed to her to leave the train on the side next to the depot; that she turned to leave it on that side, when it started as stated. Several witnesses were introduced for the appellant, whose testimony tended to contradict the testimony of the appellee and her witnesses, whose testimony was to the effect that, after she had left the train, and was standing on the platform provided for passengers, she, in company with others, started to cross one of the platforms on the car, and while doing so the train

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started, and threw her to the ground, as claimed by her. Two of the witnesses who were introduced by the appellant, previous to giving the testimony in the case, had given written statements prepared by themselves, in which it is stated that the accident occurred substantially as claimed by the appellee. There was a conflict in the testimony as to the manner in which the injury occurred. The jury was charged with the responsibility of reconciling, so far as possible, the statements of witnesses, and determining from them the exact circumstances under which the injury was inflicted. The verdict of the jury on the evidence of this case, if it was properly instructed, is just as binding on this court, if it intends to give it the weight which the law contemplates it shall have, as the judgment of this court is upon the lower court. The appellant admitted that the appellee was a passenger upon its train from Nashville to Springfield, but claimed that she had ceased to be a passenger at the time she received the injury, upon the idea that she had left the train, stood upon the platform, and was injured in an effort to go over the steps and platform of the car to the opposite side. Of course, the theory of the appellee was that she had not ceased to be a passenger at the time she received the injury.

There are two grounds urged for a reversal of the case. One is that the burden of proof was upon the appellant, and it was therefore entitled to close the argument; the other, that the court erred in instructing the jury. We will briefly consider the questions in the order stated. It is urged that this court has held in a case where a passenger has been injured by a carrier in transporting him that the presumption was to be indulged that it was the result of its negligence. This is true, but this is not a case for the application of that rule. The appellant denies that the appellee was injured while a passenger on its train. The burden was upon the appellee not only to show that she was injured, but that she, at the time she received the injury, was a passenger on appellant's train. Under the pleadings and proof in this case no presumption could be indulged that an injury had been inflicted by the negligence of the appellant. Had no evidence been offered, the judgment would have gone against the appellee, and when such is the case the burden of proof is upon the one against whom judgment would go without the introduction of evidence. The court properly ruled that the burden was upon the appellee. If those in charge of the appellant's train, upon which the appellee was a passenger, failed to hold it long enough to enable her to alight therefrom in safety, and while she was making an effort to do so was injured, the appellant should respond in damages for the injury inflicted. This is true although those in charge of the train did not see her at the time she was alighting. If they held the train sufficiently long to enable her to alight from it in safety, and she did not use such speed in doing so as she should have, still if she

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attempted to alight from it in the presence of any of those in charge of it, and with that knowledge they gave the signal to start while she was in the act of alighting, and the train did start, throwing her from it, and inflicting an injury upon her, the appellant is liable in damages for the injury which she sustained. Upon the trial of the case both sides recognized the correctness of these principles, as did also the trial court. The accident occurred in Tennessee. It was held in *Railroad Co. v. Whitlow's Adm'r* (Ky.) 43 S. W. 711, 41 L. R. A. 614, that in actions *ex delicto* the law of the place where the right was acquired governs as to the right of action, and that the law of contributory negligence as adjudged in this state cannot be applied so as to alter or defeat a recovery under the laws of another state. In that case, as in this, the injury was received in Tennessee. The appellee pleaded the Tennessee law, by which the rights of the parties are to be determined in this case; and the appellant admits in its answer that the appellee has correctly stated the law, except in one particular. The correction or addition made by appellant was accepted by the trial court as being the law of Tennessee as reduced by its instructions to the jury. It is true that in instruction No. 1 the court told the jury the kind of care which the appellant was required to exercise in the transportation of passengers, and in doing so employed language not approved by this court in defining the care that carriers are required to exercise in the transportation of passengers in this state. However, the language used defining the care is that which is required to be exercised by carriers under the law of Tennessee. It is averred "that by the laws of the state of Tennessee in force at the time of the injury the defendant undertook and agreed to use the utmost human care and foresight known to prudent and careful men," etc. The instruction, in defining the care that should have been used, employed substantially the same language quoted above. The instruction is also criticised because the court used the words "moved and jerked" in the instruction. If the train had not remained at the station long enough for the appellee to alight from it in safety, and started, thus throwing her from it, and injuring her, the company is liable whether the train jerked or not. It was *per se* negligence to move the train under such circumstances. If it remained at the station long enough to permit the appellee to alight in safety, and she had failed to do so, but was in the act of alighting in the presence of the conductor, and he started the train with that knowledge, it was *per se* negligence. In another instruction the court properly told the jury that, if the train had stopped a sufficient or reasonable length of time for her to alight in safety, and she failed or delayed to do so, and the conductor or those in charge of the train, not knowing and having no reason to believe that she was in the act of getting off, caused it to start, the appellant was not liable for the injury. It also instructed the jury that if she alighted

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from the train, and thereafter was hurt in an effort to cross over from the platform between the cars, without the direction or knowledge of the conductor or other employees in charge of the train, the jury should find for the appellant, although they believe from the evidence that the train started with a jerk, and threw her to the ground. It seems to us that on the questions just considered the instructions were so plain that the jury could not have misunderstood them, and they were just as favorable as the appellant had the right to ask. Following the Tennessee law, the court gave instructions Nos. 5 and 6. In instruction No. 5 the court told the jury that if it believed from the evidence that the plaintiff was negligent at the time she was injured, and that such negligence contributed to the injury, still, if they further believe from the evidence that, notwithstanding such negligence, the defendant's servants in charge of the train were guilty of such negligence in moving or jerking train as was the direct and proximate cause of plaintiff's injury, they should find for her. In instruction No. 6 the court told the jury that, if she was guilty of such negligence as was the direct and proximate cause of her injury, they should find for the defendant, although they might believe from the evidence that defendant's agents in charge of the train were at the same time guilty of negligence as a contributory cause of the injury. As admitted in this record, under the Tennessee law the plaintiff may recover, although she may have been guilty of negligence contributing to her injury, provided the negligent act of the appellant was the direct and proximate cause of it. At the same time the law of that state does not hold a party guilty of a negligent act liable, although he contributed to the injury, if the injury was the direct and proximate result of the negligent act of the party injured.

The judgment is affirmed.

PHILLIPS v. SOUTHERN RY. CO.

(*Supreme Court of Georgia, Dec. 11, 1901.*)

[40 S. E. Rep. 268.]

Right to Discriminate between Passengers in Charging.

A railroad company cannot lawfully demand of one passenger more fare for his transportation from one station to another upon its line than it is in the habit, under like conditions and circumstances, of charging others for the same service.

Same—Failure to Have Ticket—Opportunity to Procure.*

Although a railroad company has a right to adopt and enforce a rule requiring passengers getting on its trains without tickets to pay more fare than it charges persons who purchase tickets, yet it cannot exact such higher rate from a passenger who has no ticket, unless it

*Coyle v. Southern Ry. Co. (Ga.), 20 Am. & Eng. R. Cas., N. S., 529, and notes, 533 et seq.

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has afforded him a reasonable opportunity to purchase one before entering the cars.

Sufficiency of Petition.

Applying these principles to the allegations contained in the plaintiff's petition, it follows that such petition set forth a cause of action, and therefore the court erred in sustaining the motion to dismiss it.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by M. K. Phillips against the Southern Railway Company. From a judgment sustaining defendant's motion to dismiss the petition, plaintiff brings error. Reversed.

Jas. Beall and Edwards & Ault, for plaintiff in error.

Hugh M. Dorsey and J. Branham, for defendant in error.

FISH, J. The plaintiff sued the Southern Railway Company for damages alleged to have been sustained by him by reason of his having been unlawfully expelled from one of its passenger trains. Leaving out certain allegations in reference to the nature and extent of the injury, his petition made the following case: "On the 14th day of January, 1899, the plaintiff applied to the defendant, through its agent, R. L. Fields, at its ticket office at Bremen, Ga., to purchase a ticket from Bremen to Temple, on its line of road, for the purpose of taking passage on the regular passenger train, which was due to arrive at Bremen at about 9:45 o'clock a. m." He made the application to such agent "about thirty minutes before said train was due to arrive, and was told by [the] agent that he could not sell a ticket for said train to Temple, but that it was the custom to ask the conductor when the train arrived if he would have occasion to stop the train at Temple, and if the train should stop at Temple the conductor would accept plaintiff as a passenger on the same from Bremen to Temple, and would charge only the ticket rate of fare, which regular fare was twenty-five cents." When the train arrived at Bremen, plaintiff ascertained from the conductor thereof that it would stop at Temple, and "he accordingly went aboard said train, under said instructions, for the purpose of making said trip from Bremen to Temple." "Soon after the train left Bremen, said conductor came to plaintiff to collect his fare, and plaintiff, having the exact change, handed him twenty-five cents, which he took, but refused to accept as full fare for said trip, but demanded four cents per mile as train fare." Plaintiff declined to pay the additional charge, and was by the conductor ejected from the train. "It was the custom of said defendant to accept and transport passengers from Bremen to Temple * * * without tickets, and for only three cents per mile, on all occasions when said train would stop at Temple for any purpose." When the case came on for trial the defendant moved to dismiss it on the ground

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that no cause of action was set forth in the petition. The court sustained this motion, and the plaintiff excepted.

1. We are clearly of opinion that the plaintiff's petition set forth a cause of action, and therefore the court erred in sustaining the motion to dismiss it. If, relatively to this train, the custom or practice of the defendant company in conducting its passenger business from Bremen to Temple was as alleged in the petition, and the plaintiff, being informed of this custom by the ticket agent of the defendant at Bremen, ascertained from the conductor of the train, upon its arrival at that place, that it would stop at Temple, and thereupon boarded it for the purpose of going to Temple, and, when the conductor came around to collect his fare, paid to him the amount of the regular ticket fare, then the plaintiff had the right to be carried on that train to his destination, and the conductor could not lawfully eject him therefrom because he refused to also pay the difference between this fare and the fare usually required of persons getting on the defendant's trains without tickets. If, under like circumstances, the defendant company was in the habit of carrying passengers from Bremen to Temple at the regular ticket rate of fare, it had no right on this occasion to demand of the plaintiff more than this rate, because to do so would be an unjust discrimination against him, which the company, by the laws of this state, was forbidden to make. Civ. Code, § 2188. It was bound, under like conditions, to accept him as a passenger upon this train upon the same terms as those on which it habitually accepted others; and therefore it could not lawfully expel him from the train because he refused to pay more fare than it, under similar circumstances, was in the habit of charging others. The defendant in error relies upon the decision rendered in *Johnson v. Railroad Co.*, 108 Ga. 496, 34 S. E. 127, 46 L. R. A. 502. There the petition showed that the plaintiff, on a designated Sunday, went to the depot of the defendant at Dunlap for the purpose of purchasing a round trip ticket from that station to Crawford, another station on the defendant's line of road. Dunlap was a regular ticket station, and it was the custom of the defendant to issue round trip tickets on Sundays from Dunlap to Crawford for the sum of 24 cents, which was less than the regular fare of 3 cents per mile. The plaintiff, being aware of these facts, went to Dunlap about one hour and a half before the train was due upon which he desired to take passage, and remained there all the while and sought to procure a ticket; but the ticket office was not open, nor was there any person there to sell tickets, and hence he was unable to procure one. When the train arrived, he got upon the same, and, when the conductor came to him to collect his fare, he stated to him that he desired to go to Crawford and return, and also the facts showing that the company had rendered it impossible for him to purchase a ticket before boarding the train. He then offered to pay the conductor 24

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cents for the round trip which he proposed to make. The conductor refused to accept this sum, but demanded of him the regular fare of 3 cents per mile, and, upon his declining to pay this amount, ejected him from the train. Upon these facts, it was held that the custom of the defendant company in selling round trip tickets on Sundays for less than the regular ticket rate of fare was a purely voluntary one on its part, which it had the right to discontinue at any time, and that the fact that the ticket office was closed and the ticket agent absent on this particular Sunday was *prima facie* notice that the company had, at least as to that station and for that day, abandoned the custom, and that the offer to the public impliedly held out by such custom had been withdrawn, and therefore, in the absence of facts showing that such was not the intention of the company when the plaintiff got upon the train for the purpose of making the round trip between Dunlap and Crawford, he could not rely upon this custom to constitute a contract of carriage at the reduced rate which the company was formerly in the habit of charging. The facts set up in the petition in the present case are materially different. Here there is nothing whatever to show that the plaintiff had any notice, either actual or implied, that the defendant company had abandoned, or intended to abandon, the custom alleged in the petition, and upon which the plaintiff relied when he entered the train, nor anything to show that the company had even temporarily abandoned such custom. On the contrary, when the plaintiff attempted, at Bremen, to purchase a ticket for his passage on the train in question from that place to Temple, and the ticket agent refused to sell him one, he was informed by such agent of the existence of the custom, and told upon what condition the railroad company would, under this custom, take him upon this train to Temple. Upon the arrival of the train he ascertained from its conductor that this prerequisite condition existed, and thereupon entered the train, and subsequently gave to the conductor the amount of fare which the company was in the habit of charging others under the same circumstances. In the case cited by counsel the plaintiff sought to accept an offer of the defendant company impliedly held out to the public, but which before he entered the train he was bound to know had been withdrawn. In the present case the implied offer of the company was still pending, and the company could not, after the plaintiff had accepted it by performing his part of the contract, withdraw this offer. In the former case the implied offer of the company was withdrawn as to the public generally. In this case not only had the implied offer of the company not been withdrawn as to the public generally, but it was not even withdrawn as to the plaintiff until he had fully complied with its conditions.

2. Again, the courts of this country are quite uniform in holding that, although a railroad company has the right to

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adopt and enforce a rule or regulation requiring passengers getting on its trains without tickets to pay more fare than it charges persons who purchase tickets, yet it cannot lawfully exact such higher rate from a passenger who has no ticket unless it has first afforded him a reasonable opportunity to purchase one before entering the cars. This is the rule in this state. *Railway Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; *Railroad Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352. See, also, *Railroad Co. v. Murden*, 83 Ga. 753, 10 S. E. 364. According to the allegations of the petition in the case now in hand, the defendant company did not afford the plaintiff any opportunity whatever to purchase a ticket, but, when he endeavored to procure one, refused to sell it to him. He was therefore not at all at fault in getting on the train without a ticket, and it is only when the fault is that of the passenger, and not that of the railroad company, that the latter can charge more than the ticket rate of fare as a penalty for getting on the train without first procuring a ticket. The company made it impossible for the plaintiff to purchase a ticket before getting on the train, and could not, therefore, require him, as a prerequisite to its acceptance of him as a passenger, to pay to it a penalty for his failure to do so. There is nothing in the petition which indicates that the demand which the conductor made upon the plaintiff for four cents per mile was predicated on any rule or regulation of the railroad company, under which it charged all persons desiring to take advantage of the exceptional opportunities afforded them of going from Bremen to Temple upon this particular train more than it charged its passengers generally. On the contrary, it is distinctly alleged that it was the custom of the company, whenever this train was going to stop at Temple, to take passengers from Bremen to that place at the regular ticket rate of three cents per mile; and it is also alleged that the conductor demanded of the plaintiff four cents per mile as train fare. It is unnecessary, therefore, to determine whether or not the defendant could have lawfully charged all passengers who might take this train from Bremen to Temple more than its regular ticket rate of fare for the privilege of being carried to the latter place on this particular train. We may say, however, in passing, that we are inclined to think that it could not. It is clear that the conductor could not lawfully demand train fare, instead of ticket fare, of a person who had had no opportunity whatever to purchase a ticket, as a penalty for his not having a ticket. The conductor did not question the right of the plaintiff to be carried on this occasion and on this train from Bremen to Temple, but recognized such right by demanding fare of him. The plaintiff then stood upon the footing of a passenger rightfully on the train, and rightfully there without a ticket, and therefore could not be lawfully ejected therefrom because he refused to comply with an unauthorized demand for the payment by him, in addition to the amount of

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the regular ticket fare, of the difference between that fare and the fare charged persons getting on trains without complying with the rule in reference to the purchase of tickets.

3. It follows from the foregoing that, taking the allegations of the petition to be true, the plaintiff was unlawfully expelled from the train by the conductor, and consequently, as we have said, the court erred in sustaining the motion to dismiss the case.

Judgment reversed. All the justices concurring.

CAMPBELL v. LOS ANGELES RY. CO.

(*Supreme Court of California, Dec. 21, 1901.*)

[67 Pac. Rep. 50.]

Street Railways—Personal Injuries—Passenger Stepping from Moving Car.*

Where plaintiff told the motorman to stop at a certain street, of which request he took no notice, and while crossing such street plaintiff touched the motorman, and asked him why he did not stop the car, whereon the motorman immediately proceeded to slow up, and while doing so told plaintiff not to get off until the car stopped, but plaintiff stepped off the car before it stopped, and was injured, he was not entitled to recover.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by Alexander Campbell against the Los Angeles Railway Company. From a judgment for defendant, and from an order denying motion for new trial, plaintiff appeals. Affirmed.

Chas. Silent, George J. Denis, Stephen M. White, Cole & Cole, and Anderson & Anderson, for appellant.

Bicknell, Gibson & Trask, for respondent.

COOPER, C. Action to recover damages for personal injuries. The case was tried before the court without a jury, and judgment entered for defendant. Plaintiff brings this appeal from the judgment and order denying his motion for a new trial. There is no controversy about the facts, which are substantially as follows: At about 11 o'clock on the night of March 4, 1899, the plaintiff entered one of defendant's street cars at Second street, in the city of Los Angeles, and paid the regular fare. It was an electric car, having an open dummy at each end, which was provided with two seats for passengers, four feet long, running parallel with the car on each side of the part of the car called the "dummy," and fac-

*As to contributory negligence in alighting from moving street car, see *New Jersey Traction Co. v. Gardner* (N. J.), 9 Am. & Eng. R. Cas., N. S., 843, and foot-note; 23 Am. & Eng. Enc. Law 1011 et seq.; 7 Rap. & Mack's Dig. 487 et seq.

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ing outward. The place occupied by the motorman was between these two seats. The plaintiff took a seat near the front of the dummy, to the left of the motorman, and near him, and desired to be let off the car at Sixth street. The car was going at the rate of about 10 miles an hour. Plaintiff testified that shortly after the car passed Fifth street he twice told the motorman to stop at Sixth street. That the motorman did not make any sign, motion, or reply, and took no notice of plaintiff's request to stop. The motorman testified that he did not hear plaintiff request him to stop the car until while crossing Sixth street, when plaintiff touched his left arm, and said, "Stop at Sixth street." Plaintiff testified that as the car was crossing, or partly across, Sixth street, he said to the motorman, "Why the devil don't you stop at Sixth street?" Thereupon the motorman immediately proceeded to slow up, and, while doing so, told plaintiff not to get off till the car stopped. The plaintiff, when the car had almost stopped, stepped off the car before it had come to a full stop, and in doing so fell, and broke his right hip, severely injuring himself. Plaintiff testified: "I occasionally stepped off the car while the car was in motion, and stepped off once in the night a short time before this. I stepped off the car occasionally, and up to the time of this accident would occasionally do so in the daytime, but latterly I was very cautious about it. But at night I would not get off the car before it had stopped, for the reason that I had met with what you allude to. I had attempted to get off one night, when the car was in motion, and the result of it was that I fell, and shook myself up, just as I thought I was shaken up on this night; but it gave me a lesson, and never after would I get off these cars at night when they were in motion, if I knew it." The place where the car was stopped was about 150 feet beyond Sixth street and was as safe a place as the crossing at Sixth street. The court found "that plaintiff's injury was due wholly to his stepping off the car while it was still in motion, and such injury was not occasioned by the negligence of defendant." In appellant's brief it is said: "We admit that it is mechanically true that the plaintiff fell because the car was in motion, that he would not have fallen had the car been at a standstill, and that defendant was not negligent in having the car in motion at the moment when plaintiff fell."

We think the plaintiff is not entitled to recover on the above facts. The defendant did not commit any breach or omission of legal duty. *Donovan v. Ferris*, 128 Cal. 54, 60 Pac. 519, 79 Am. St. Rep. 25. The motorman quickly and promptly stopped the car when last requested by plaintiff. It was stopped in a safe place. Plaintiff was warned not to get off until it had stopped. It is difficult to imagine what greater care could have been exercised by defendant. It is said in *Booth, St. Ry. Law*, § 337: "But it has been held to be negligence per

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se, which justifies a nonsuit, to step off the car while it is being slowed up in order to stop in response to a passenger's request, or when incumbered by a load or bundle." In a late case before the supreme court of New York (*Saffer v. Railroad Co.*, 5 N. Y. Supp. 701) the defendant had requested the lower court to give the following instruction, which was refused: "If the jury believe that while the car was being slowed up in order to stop in response to the plaintiff's request the plaintiff, without waiting for the car to be stopped, stepped off the car while in motion, and thereby sustained his alleged injury, then the plaintiff was guilty of contributory negligence, and the defendant is entitled to a verdict on that ground." The court held that it stated the law correctly, and should have been given. In the opinion it is said: "If he got off while the car was in this rapid motion, then it was negligence, and, if he did anything in the way of getting off the car which helped or contributed to bring about the injury, then there was contributory negligence on his part, and he was not entitled to recover." It is said in *Schouler, Bailm.* (3d Ed.) § 662: "Thus a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station or in starting before he had due opportunity to land." In *Craven v. Railroad Co.*, 72 Cal. 347, 13 Pac. 879, this court said: "Did the plaintiff, at the very time of the accident, negligently jump off the train while it was moving, and thus cause or contribute to the injury? If she did not, then the verdict should have been for plaintiff. If she did, then there can be no doubt that her negligence contributed proximately to the injury. It was the very thing which then and there directly and immediately caused it." See, also, *Hagan v. Railway Co.*, 15 Phil. 278; *Nichols v. Railroad Co.*, 38 N. Y. 133, 97 Am. Dec. 780; *McDonald v. Railway Co.* (Ala.) 20 South. 317. The rule would apply with greater reason in this case, because plaintiff testified that the motorman said to him, "Don't get off until the car stops."

It is urged by appellant that the motorman was told to stop before he reached Sixth street, and that it was negligence in the defendant for him not to do so. The evidence shows that the motorman did not hear the request, but, conceding that he did, it would not change the result. If the motorman was negligent in not stopping the car when first requested, he did finally stop in a careful manner, and with due caution to plaintiff. Because the motorman did not stop the car when first requested furnishes no excuse for plaintiff getting off while it was in motion. There might be cases in which, by reason of a condition brought about by the negligence of the carrier, where great danger is apparent, or where the passenger is told by the person in charge of the car to jump off, or other peculiar circumstances, it would not be negligence

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in a passenger to alight from a car while the car was moving, but the facts of this case do not take it out of the general rule.

The judgment and order should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

SANSOM v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit, November 11, 1901.)

[111 Fed. Rep. 887.]

Carriers—Death of Passenger—Evidence of Negligence.

Plaintiff's intestate purchased tickets over defendant's railroad, and took a train which was advertised as a "solid vestibule train." Having occasion to obtain a ticket at a station for a member of his party, he requested the conductor to purchase it; but the conductor refused, and advised him that the train made but a short stop, and he had best go to the front end, which stopped nearest the station. On reaching the platform of the front car, which was a day coach, used for local business, and not vestibuled, a sudden lurch of the train threw him off, and he was killed. The accident occurred in the daytime, and at a place where the country was hilly and there were many curves in the road. Action was brought to recover for his death on the ground of defendant's negligence. Plaintiff introduced expert testimony which tended to show that the lurching of the train might have been caused by a low joint in the rail or by excessive speed, but there was no proof of either. On the contrary, defendant's evidence that the track was in good condition and the speed not excessive was uncontradicted: *held*, that the placing of a car without vestibules in the train could not be considered negligence, and the fact that it was advertised as a solid vestibuled train was not material, since the action was not grounded on a breach of contract, and the condition of the car was apparent; that there was no evidence upon which negligence on the part of defendant could be predicated, and a verdict for defendant was properly directed.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This case was brought to recover for the alleged negligence of the railroad company in causing the death of the plaintiff's intestate, James J. Cowan. The testimony, taking the view thereof most favorable to the plaintiff, tended to establish the following facts: Mr. Cowan, having occasion to travel on the railroad of the defendant company, wrote to a friend for a schedule of the company's trains, and received in answer a time-table, which, among others, gave the time of train No. 5, upon which he subsequently took passage. This folder or schedule contained the following statement as to this train: "Through Car Service. No. 5 carries Pullman drawing room buffet sleeping car New York to New Orleans without change, also from Chattanooga to Shreveport. This is a solid vestibuled train Washington to Memphis, carrying Pullman drawing room, sleeping car and day coaches without change." The

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deceased took passage at Johnson City. Accompanying him were his wife and son and a young lady. The train contained four passenger cars, besides express and baggage cars. The vestibuled cars were three in number,—two sleepers in the rear of the train, then a vestibuled day coach,—and following an ordinary passenger coach, without vestibules. The young lady had no ticket beyond Morristown, and it became necessary to purchase a ticket for her. Mr. Cowan, for this purpose, asked either the regular conductor or the Pullman conductor to purchase the ticket at Morristown. This the conductor declined to do, and advised Mr. Cowan that it would be necessary for him to purchase the ticket, that the train stopped but a few minutes at Morristown, that the forward part of the train would be nearest the office, and that he would have to get off promptly; and thereupon the deceased started forward through the train, having obtained from the young lady the money with which to purchase her ticket. He passed through the vestibuled cars, and reached the vestibule on the car just back of the day coach, which had no vestibule, when a lurch of the train threw him against the accordion part of the vestibule. Gathering himself, he passed upon the platform of the car without a vestibule, when another lurch threw him backward from the train, resulting in injuries which caused his death. These lurches are described by some of the witnesses as being severe and unusual. Had this coach been provided with a vestibule, the injury could not have happened. At the time the deceased was thrown from the train it was rounding one of the curves, which are quite numerous in the company's road, owing to the contour of the country. Expert testimony was also introduced by the plaintiff tending to show that the violent, recurring lurches should not occur on a properly constructed road; that such lurches indicated either a low joint, or that the train was running with too great velocity; the expert stating in this connection that a train might safely run at a rate of from 50 to 60 miles an hour if the track was properly constructed. The defendant introduced testimony tending to show that the train was not running to exceed 45 miles an hour; that the track was in good condition and properly constructed, the appliances safe, and the management proper. The plaintiff relied for recovery upon negligence of the company in four respects: "(1) In failing to provide a solid vestibuled train after it had been advertised, and failing to warn Mr. Cowan of the danger resulting from the absence of vestibules; (2) in instructing him to go forward without warning him of the danger; and either (3) in allowing a low joint in the rail in the curve, causing the lurches that threw Mr. Cowan from the train; or (4) in the negligent handling of the train which caused these lurches." At the conclusion of the testimony the trial judge instructed the jury to return a verdict upon the testimony in favor of the defendant.

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Edward T. Sanford, for plaintiff in error.

Leon Jourolmon, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

In cases where the propriety of the court's action in instructing a verdict for the defendant is in review, certain general principles are to be borne in mind. The view of the case most favorable to the plaintiff is to be taken in determining whether the case is to be submitted to a jury. In cases of alleged negligence where the facts are undisputed the question of liability is often one of fact, not of law. Except in those cases where the law has clearly defined a specific duty, the omission of which may constitute negligence, the solution of the problem depends upon whether the conduct in question is deemed to be that of one of ordinary prudence under the same or similar circumstances. Who shall determine this matter? Is it one of fact or law? A court may not set up its own standard of ordinary care, and require the party to conform to that, and permit a recovery or otherwise as it may determine the facts to show ordinary prudence, or the lack of it, in the conduct under investigation, except in cases where fair-minded men would be agreed that the facts did or did not show a want of due care. Judge Cooley concludes an elaborate discussion of the question in this way:

"If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary, he should say to them, 'In the judgment of the law, this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence, or the want of it, as one of law." Cooley, Torts, 670.

This rule is in conformity with *Railroad Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485, and *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274.

Another principle is to be borne in mind in this connection, which requires the party charging negligence to prove it, and show not only the negligent act complained of, but as well the resulting injury to the plaintiff. Applying these general rules, did the plaintiff make out a case which required the submission of the right of recovery to a jury?

There is no statute or rule of law of which we are advised requiring the defendant to use vestibuled cars. It is true that it has been held, and we think properly so, that, where a

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company has undertaken to provide a vestibuled train, it is negligence to permit the appliances to be out of order, or to leave the doors carelessly open, so that passengers who rely and have a right to rely upon the safety and proper management of the train are injured thereby. It was so held in the case cited by counsel from the Eighth circuit court of appeals (*Bronson v. Oakes*, 22 C. C. A. 520, 76 Fed. 734), where the court held it was negligence to leave open an outside vestibule door through which a passenger fell at night; the testimony showing that the train was moving rapidly, the vestibule poorly lighted, and the passenger mistaking the open door for the car door, through which he intended to pass on his way through the train. In the present case the through cars were properly vestibuled. There was no defect in their construction or management. The fault, if any, was in putting an ordinary car, for the accommodation of local traffic, into the vestibuled train. For such purposes an ordinary car, without vestibules, would be more convenient, if not so safe as vestibuled cars. In the absence of any rule of law requiring all cars to be vestibuled, the negligence in this respect must consist in having, by the advertisement, held out to prospective passengers the assurance that this was a "solid vestibuled train," whereas it was broken, without notice, by the introduction of the car for local traffic, thereby inducing the passenger to act upon the supposition that he was upon a solid train, and be less guarded in passing from car to car. Assuming, without deciding, that the deceased had a right to rely and did rely upon the statement in the folder, it must be remembered that this car was upon a train to be run in daylight. The want of a vestibule was plainly visible. This is not an action upon contract. There is no claim that the defendant agreed to carry the passenger upon a train of vestibuled cars. Was the railroad guilty of a want of care likely to produce injury in thus introducing a car where it must have been evident to those having occasion to use it that it was not provided with a vestibule? We think this question must be answered in the negative, and that there was no failure to observe that degree of care, precaution, and vigilance justly demanded by the circumstances, the absence of which constitutes negligence. Nor do we perceive any negligence in the statement of the conductor to the deceased that he could not purchase a ticket for him at Morristown, and that it would be necessary for him to go forward for that purpose. This was rather advice as to how the deceased could procure a ticket, than an order upon which he acted to his injury.

The expert testimony introduced by the plaintiff as to the cause of the lurch of the train might attribute it either to a low joint, or undue speed in rounding the curve. The same witness stated that a train might be properly run on such a curve at the rate of 50 to 60 miles an hour. The construction and the condition of the track was a matter susceptible of

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proof by the plaintiff as well as the defendant. The only testimony upon these subjects was that introduced by the defendant, which tended to show a properly constructed track, in good condition. There was no testimony tending to show excessive speed. This railroad, running through a hilly country, necessarily having frequent curves in its track, while bound to use the highest care in its construction and the management of its trains, cannot avoid the lurching incidental to such conditions.

Upon the whole case, we reach the conclusion that, deplorable as the consequences were, there was no substantial evidence tending to show a want of the care required in the transportation of passengers, and the trial court was warranted in so instructing the jury. The judgment will be affirmed.

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(*Supreme Court of Pennsylvania, July 17, 1901.*)

[49 Atl. Rep. 788.]

Street Railway—Accident to Passenger—Negligence of Motorman.*

As a street car approached a point where the wall of a building was being taken down, and bricks were piled in the street close to the tracks, a person from the middle of the street signaled the motorman to stop by holding up his hands and calling to him, but he, though seeing and hearing the warning, kept on: *held*, that there was negligence authorizing recovery for injury to a passenger occasioned by the bricks being forced into the car by the falling of part of the wall.

Appeal from court of common pleas, Philadelphia county.

Suit by Katharine R. Buehler against the Union Traction Company. There was a compulsory nonsuit, and plaintiff appeals. Reversed.

Eugene Raymond, for appellant.

Russell Duane and Thomas Leaming, for appellee.

BROWN, J. Instead of that high degree of care which should at all times be exercised by a motorman in charge of a trolley car, there was an absence of even ordinary care and caution by the one on the car of the defendant below at the time the plaintiff was injured. The car was going down South Twelfth street, in the city of Philadelphia, on the afternoon of June 4, 1897. At the southwest corner of Twelfth and Walnut streets the bricks taken from a building that was being torn down had been placed in the former street, between the west rail of appellee's track and the curb. This pile of bricks, according to one witness, was 2 feet and 6 inches from the track, and, according to another, 3 feet and 6 inches. It was

*As to the degree of care required of carriers of passengers, see generally, note, 9 Am. & Eng. Enc. Law (2d Ed.) 639 et seq.; 9 Cent. Dig., col. 1012 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 519 et seq.; 2 Rap. & Mack's Dig. 355 et seq.

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8 or 10 feet wide, about 8 feet high, and 20 feet long. Its exact dimensions, however, are unimportant. The north end of it was 12 or 16 feet from the south crossing on Walnut street. A portion of the wall of the old structure, about 8 feet high from the first floor, or 11 feet in height from the pavement, was about to be torn down, when the car on which the plaintiff was riding was seen approaching from the north, in the vicinity of Sansom street. The wall was then trembling, according to the testimony of John Elliott, and he ran out to the middle of the track on Twelfth street, at its intersection with the south crossing on Walnut, and, holding up his hands, called to the motorman to stop. Disregarding this warning, given when the car was still north of Walnut street, the motorman went on until his car was alongside the pike of bricks, when the wall of the house, falling against them on the west side, forced some of them into the car, causing the injuries complained of by appellant.

It is true that the mere forcing of the bricks into the car by the falling wall would not in itself raise any presumption of negligence on the part of the company, for there was no privity between it and the contractor who was tearing the building down, and the injury to the plaintiff resulted from no defective track, car, machinery, motive power, nor from anything under the direct control of the company. *Railroad Co. v. Gibson*, 96 Pa. 83; *Hayman v. Railroad Co.*, 118 Pa. 508, 11 Atl. 815; *Railroad Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820. But the injury was the result of the carelessness of the company's employee in disregarding the timely warning of danger into which he took his car with its load of passengers. His duty was at all times to be on the alert, looking ahead of him for any sudden or unexpected danger, and this was especially true when he was about to pass the point where private improvements had, to some extent at least, temporarily obstructed the street. If he had been so on the alert and, with no warning given him of unseen impending danger, had gone on, and the bricks had suddenly and unexpectedly fallen into the car, there would not, we repeat, be a presumption of negligence against the company. It is not, however, for injuries resulting from any sudden or unexpected danger, caused by the independent conduct of another, into which the car ran, that the appellant insists upon the company's liability to pay; but her contention is that the injury that came to her would have been avoided but for the negligence on the part of the company's employee in refusing to heed the warning, which had been given him in time by those who were in a position to give it, of the peril that confronted him and his car load of passengers. It offends against reason to say that, under such a state of facts, there was no negligence on the part of the company's employee for which it is now answerable. *Phillips v. Railway Co.*, 190

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Pa. 222, 42 Atl. 686, seems to have been relied on by counsel for appellee in support of the motion for a nonsuit in the court below, and is pressed upon our attention as authority for not disturbing the judgment. In that case, a runaway horse, dashing eastward on Walnut street, ran into a car going south on Fourth street, as it was about to cross Walnut, and our Brother Fell, in expressing the judgment of the court that the rider could not recover for the injuries which resulted from his collision with the car, said: "We are unable to see in this testimony any evidence of negligence on the part of the motorman. There is no evidence that he heard the plaintiff call to him or that he was otherwise made aware of the approach of the runaway horse. It was his duty, undoubtedly, to look for approaching cars and other vehicles which might collide with his car; but anything moving with the speed of a runaway horse was not to be apprehended, and he might very well have assured himself that none of the ordinary dangers of street crossings threatened him without having either heard or seen the approach of the plaintiff. He had not brought his car to a full stop at the crossing, nor was there, as far as the testimony shows, any reason why he should. A motorman certainly cannot be required to stop at every crossing and look for such extraordinary perils as the one in this case, nor can he be required to stop at all, unless the circumstances are such that it would be imprudent for him to do otherwise. In this case, it being Sunday, and the streets consequently comparatively clear of travel, and there being nothing on Walnut street which, if moving at a reasonable rate of speed, would have collided with him, a full stop would have been entirely uncalled for. But, even assuming that he knew the situation perfectly, it cannot be said that he was bound, upon being confronted by so sudden and immediate a danger, to do what, after mature deliberation, would have seemed to a prudent man to be the wisest thing under the circumstances. Where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there must be not only a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, but also a reasonable opportunity to perform it. *Railroad Co. v. Kelley*, 102 Pa. 115." In the case now before us there was negligence on the part of the motorman in rushing into danger with his car after he had received timely warning that it was in front of him. There is evidence that he saw and heard, or that he must have seen and heard, Elliott calling upon him to stop, and that the warning was given him in time to enable him to stop his car. The danger against which he was warned was in front of him, where he was bound to be constantly on the lookout for it, and especially under the condition of the street to which we have already referred. But he saw fit, in the face of this warning, to exercise his own

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judgment, and go on, instead of stopping his car and waiting for the danger to pass by before proceeding on his way, as ordinary care and prudence should have prompted him. It is certainly not needful that we should further distinguish between the case referred to and the one as presented by this plaintiff, which was clearly for the jury. The judgment is reversed, and procedendo awarded.

FARNON v. BOSTON & A. R. Co.

(*Supreme Judicial Court of Massachusetts, Worcester, Jan. 1, 1902.*)

[62 N. E. Rep. 254.]

Contributory Negligence—Failure to Take Seat.*

A passenger on an excursion train entered the last car, and went through seven coaches, looking for a seat, but people were standing in the aisles and on the platforms. He testified that the doors were open, and he then stopped and looked forward through the cars ahead, and that every car was crowded, and he then stood in the aisle of the car until the train stopped, when he went to the threshold of the car, and while standing there was injured by the sudden backing of the train. Plaintiff knew that there were about 14 cars, and that 1,000 people were supposed to go on the train. Defendant's evidence showed that there were 1,102 seats and 952 passengers, and vacant seats in the two front cars. Neither the conductor nor the brakeman informed plaintiff that there were vacant seats in the front coaches: *held*, that the failure of the passenger to take a seat was not such negligence as would prevent a recovery for such injury.

Same—Same—Sufficient Number of Seats—Question for Jury.

The submission of the question whether there were enough seats for all the passengers was not error, though the plaintiff could not have seen whether there were empty seats in any of the front cars.

Same—Same—Whether Passenger Chargeable with Knowledge of Seating Capacity of Car.

The plaintiff, who was between 16 and 17 years of age, was not chargeable with knowledge of the seating capacity of the cars.

Injury to Passenger—Sudden Jar from Starting Train—Negligence.

The locomotive was not one of the largest, and had never been used before on a 15-car train, but the engineer testified that it could draw 15 loaded passenger coaches. The train was stopped at a steep grade, on a curve, by the application of the air brakes, by a person not in defendant's employ, and the engineer could not start the train without backing to take up the slack which resulted in each car going backward with a sudden jar. Defendant's servants did not warn the passengers that the cars would be so started, and plaintiff was injured by being thrown down by the backward motion: *held* sufficient evidence of defendant's negligence in failing to furnish sufficient motive power, and of its employees in failing to call attention to the danger, to go to the jury.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

*As to whether it is contributory negligence for a passenger to stand in the aisle, see *Lane v. Spokane Falls & N. Ry. Co.*, 14 Am. & Eng. R. Cas., N. S., 436, and notes, 454 et seq.; 9 Cent. Dig., col. 1380 et seq.; 2 Rap. & Mack's Dig. 498 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 681 et seq.

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Action by one Farnon against the Boston & Albany Railroad Company for personal injuries received by him while a passenger on defendant's railroad. Judgment in favor of plaintiff, and defendant brings exceptions. Exceptions overruled.

Herbert Parker and C. C. Milton, for plaintiff.

F. P. Gaulding and Wm. C. Mellish, for defendant.

LORING, J. While the plaintiff was a passenger on an excursion train of the defendant railroad, his fingers were caught between the bumpers of the seventh and eighth cars from the rear end of the train, and were held there for 20 seconds, while the train was backing. He put in evidence showing that he was standing just within the threshold of the forward door of the car in question, and was thrown forward onto his hands by the train backing violently, and that when he fell his hand was on the edge of the platform, and his fingers were caught between the bumper of that platform and that of the car in front of it. The defendant contended that the plaintiff's fingers were caught while he was reaching down to pick up a cigarette which he had dropped; but that contention is disposed of by the verdict, and the only questions before us are whether the jury were warranted in finding for the plaintiff, and whether the instructions were correct under which they gave him a verdict. The plaintiff and defendant do not differ materially as to the movements of the train at the time in question. The plaintiff's story is that the train stopped between stations; that some little time after it stopped it went back with a jar, which threw him down, and a second jar caught his hand. The defendant's evidence showed that the train was stopped by the application of the air brake by some person not in its employ; that the train was stopped at a steep grade on a curve, and that, in order to start the train, it became necessary to back down, and get the slack between the several cars. When this is done, each car is started separately, and the momentum of those which have been started helps the engine in starting the cars behind those which have been put in motion. In this case it appeared that the engineer tried to start the train in this way three or four times; that the fourth or fifth time he tried it he had the brake on the last car set by hand, and that he then was successful.

The defendant's first contention is that, on the evidence, the plaintiff was not in the exercise of due care. The plaintiff's testimony was that he boarded the last car of the train just before it started, and walked through seven cars, all of which were crowded; all the seats in the car were full, and "people in the aisles and people on the platform"; that when he reached the forward end of the seventh car he looked through the cars ahead, the doors being open, and every car was crowded; that "there was more of a crowd ahead than there was behind," and that it was "useless to seek for a seat

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further"; that he stood about a yard back from the door of this car until the train stopped, as we have stated, when there was a movement forward, to see "what was the matter"; that at that time he went to the threshold of the car, but not over it, and had been there some 15 seconds when the accident happened. The defendant's evidence showed that there were some 1,102 seats on the train and 952 passengers, and that there were plenty of vacant seats in the two front cars. Its contention was that it was the duty of the plaintiff to be seated, and that he cannot recover for an accident which it is manifest would not have happened to him if he had been sitting down. If the plaintiff had elected to stand when he might have sat, we should agree to this contention; but if the jury found that the plaintiff believed that the cars ahead were as crowded as were those seven through which he went, they might well have found that he was in the exercise of due care. Though he testified at the trial that "the number was limited to 1,000 that was supposed to go on the excursion," and that he knew there were 14 or 15 cars, it does not follow, as contended by the defendant, that he knew that there were seats for all. The seating capacity of a car is not a matter of common knowledge, and certainly not necessarily within the knowledge of a boy between 16 and 17 years of age, working in a machine shop for \$12 a week; and, as the plaintiff testified, there might have been persons on the train "not riding on excursion tickets"; and, finally, no suggestion that there were seats in the front car was made either by the conductor who took the plaintiff's ticket as he was going through the seven cars through which he went in search of a seat, or by the brakeman, who stood between the forward end of the seventh car—the car in question—and the eighth car during the hour and a half that the train was in transit between Boston and the place in question where it stopped. As to the further point made by the defendant that there was no evidence that there were not enough seats for all the passengers, and yet the presiding judge left that question to the jury, we agree that the plaintiff could not have seen that there was not a seat in any one of the eight cars ahead of him, and his testimony cannot be taken to be evidence to that effect; but the jury might have disbelieved the testimony of the defendant's witnesses, or found that they were mistaken. For this reason there was no impropriety in leaving it to the jury to decide whether there were vacant seats in the forward cars. For these reasons we are of opinion that the fact that the plaintiff was not seated is not conclusive against him, and that the presiding judge was right in leaving to the jury the question whether he was in the exercise of due care, and that the instructions under which that question was left to the jury were correct.

We are also of opinion that there was evidence of negligence on the part of the defendant. It is too narrow a view of the

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case to say, as contended by the defendant, that there was no negligence because the train came to a standstill on a heavy grade, and on a curve, without fault on its part; and there was no evidence that more force, or a different kind of force, was used than was necessary to start it. Apart from the right of the jury to disbelieve the evidence as to the force used, the jury might well find that the defendant was negligent in putting so heavy a train behind a single engine, which the engineer admitted was "not the largest," and was one which he had never before used on "15-car trains"; for, although he testified that its "capacity to draw fifteen loaded passenger coaches was all right,—power enough for that train,"—yet the jury were justified in finding from the event that, if the train was stopped at a bad place, the engine could not start the train without throwing down, or being likely to throw down, passengers who were standing up. The jury were justified in finding that the defendant knew that passengers were standing in this train without objection on the part of its servants who had charge of them. The negligence consisted in making up the train so that the engineer had to take up the slack, and go forward with a jerk to start it, if it happened to stop in such a place as it did stop in, coupled with the failure of the defendant, through its servants who were in charge of the train, to warn passengers that the train would start with a jerk radically different from that usually experienced when a train is put in motion.

Exceptions overruled.

WAIT v. OMAHA, K. C. & E. R. Co.

(*Supreme Court of Missouri, Division No. 1, Dec. 17, 1901.*)

[65 S. W. Rep. 1028.]

Railroads—Injury to Passengers—Carrying Passenger on Freight Train—Operation Thereof.

Plaintiff boarded a freight train in the switch yards, before it had reached the station, when it stopped at a water tank. The station agent told plaintiff that he should get on at the water tank. As the train approached the station, plaintiff stepped out of his seat to take off his overcoat, and while so occupied was violently thrown across the seats, by the train stopping at the station, receiving injuries. Plaintiff testified that he knew freight trains had to have more or less slack in the couplings which caused jolts in starting or stopping. There was no evidence of defects in track, train, or appliances, or any want of skill in the handling of the train, or that it stopped at an improper place: *held*, that the shock was an incident necessary in the running of freight trains, which the plaintiff will be deemed to have assumed.

Appeal from circuit court, Sullivan county; John P. Butler, Judge.

Action by William J. Wait against the Omaha, Kansas City & Eastern Railroad Company. From a judgment in favor of the defendant, the plaintiff appeals. Affirmed.

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Wilson & Clapp, for appellant.

J. M. Winters and J. G. Trimble, for respondent.

BRACE, P. J. This is an action for personal injuries, in which, at the close of the evidence, the court sustained a demurrer thereto, and instructed the jury to return a verdict for the defendant. From the judgment on the verdict returned in pursuance of such instruction, the plaintiff appeals. The only question in the case is whether the court erred in sustaining the demurrer. The material evidence in the record, on which this question must be determined, is as follows:

The plaintiff, who is 6 feet 1 inch tall and weighs from 220 to 225 pounds, and who was 41 years old at the time of the trial, testified as follows in chief: "On February 25, 1898, I was a traveling salesman for Bowman, Boyer & Co., of Keokuk, Iowa. On the 24th I had been in Milan,—staid all night there. The next morning I was going to Greencastle. I went down to the depot that morning (the 25th), I think, something after 7 o'clock,—close to 7. I made inquiry there about what time the train would leave. They said the train would not probably get out of Milan before 9 o'clock. I bought a ticket for Greencastle, and staid around the depot until the train came in. It was up around the yards doing its work, and after they apparently got the work done in the yards they pulled down to the water tank. The water tank, I think, is south from the depot. Not being acquainted in Milan, I cannot exactly tell the points of the compass. I do not know how far the water tank was from the depot. I never paid any attention to it since. That morning I noticed quite a length of freight train, and it was the length of that train. It was quite a distance back from the depot. I said to the agent: 'Will the train stop here at the platform?' He said: 'No; it will possibly not stop at the platform. You had better go back there and get on. When they are late, they will put right out.' I got on at the water tank, and the train started out. A man by the name of Rickett got on with me, and there was one other man on the train, both strangers to me. The train started out, and just as the caboose had got a little past the depot I supposed the train had pulled out for good, and I raised up in my seat to take off my overcoat, and I stepped out of the seat kind of sideways, and I had my left arm throwed out like that, when all at once the train stopped suddenly, and it throwed me. There was a seat directly in front of me that had no back on it,—it was broke off,—and the next seat was turned the other way, and the other one this way, and throwed two backs together; and I struck my back and side right across those two seats, and I went on there with force enough that I broke them right down, and it kind of stunned me at first, and it knocked the breath out of me, and I lay there for a half minute, and got up and sat down in the seat. I could hardly speak, and could hardly catch my breath. * * * I went on to Greencastle and

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he cannot tell, not noticing. He cannot tell. Nobody can tell. I was not hurt. I was sitting down.”

The evidence of the defendant tended to prove that plaintiff was the only one hurt in the car; that it was the custom of freight trains to stop their caboose at or near the platform of the station; that the engineer was a careful, first-class engineer; that he pulled the train up to the station in the usual manner, stopping the caboose in like manner at or near the platform; that the train was of ten cars, one of which was a Santa Fe car, with a quick-action brake, picked up in the yards there with one or two other cars; that freight trains are subject to more severe jars and jolts than passenger trains, from the fact that they cannot be coupled so close and stiff, and their violence is increased by a car having a quick-action brake in the train, a fact which the engineer cannot ascertain until he makes application of the air; that the engineer first ascertained the fact that such a car was in his train by this stop, which was the first made after the car had been put in; that when a train is made up of cars, some having air brakes and some without, as this one was, the air cars are put ahead, and the others in the rear, and as the air is applied the slack runs up, and the cars at the front do not jolt as do the cars in the rear.

It seems now to be well-settled law, here, as elsewhere, that, where a railroad company carries passengers for hire on its freight trains, “it must exercise the same degree of care as is required in the operation of its regular passenger trains; the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance.” *Whitehead v. Railway Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *McGee v. Railway Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Wagner v. Same*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; *Hays v. Railway Co.*, 51 Mo. App. 438; *Guffey v. Railroad Co.*, 53 Mo. App. 462; *Railway Co. v. Dickerson*, 59 Ind. 317; *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; *Olds v. Railroad Co.*, 172 Mass. 73, 51 N. E. 450. The rule upon this subject is very clearly expressed in the two cases last cited. In the last one, decided by the supreme court of Massachusetts in 1898, Knowlton, J., speaking for the court, said: “The law is clearly expressed in *Railroad Co. v. Arnol*, 144 Ill. 261, 270, 33 N. E. 204, 206, 19 L. R. A. 313, 315, as follows: ‘Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all the ordinary inconveniences, delays, and hazards incident to such trains, when made up and equipped in the ordinary manner of making up and equipping such trains, and managed

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with proper care and skill. * * * But, if a railway company consents to carry passengers for hire by such trains, the general rule of responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger trains; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train, and not to the other; and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from negligence or want of proper care of those in charge of it.'

* * * The plaintiff in the present case well understood the kind of business in which the defendant was engaged, and the manner in which the business was conducted. So far as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must be presumed to have contracted in reference to them, and the plaintiff to have assumed them." And the same must be said of the plaintiff in the case in hand, who in his evidence says: "I knew that trains, in order to be pulled and handled, had to have more or less slack, and that, in starting and stopping, slack is liable to cause jars and jolts, and oftentimes throws men down when they are sitting in the seats. I have been on trains when that happened. I knew that most of the trains that run have some of the cars equipped with air, and that makes a more sudden stop than the old-style hand brake."

There is no conflict in the evidence. There is no evidence tending to show any defects in defendant's track, train, or any of its appliances. No evidence tending to show any want of skill or care on the part of its employees in the management of the train from the time plaintiff got on it until the accident happened, or that the train was stopped at an improper place, or in an improper manner, or that the shock which caused his fall was not a natural and ordinary incident of the stopping of such a train in a proper manner, by the proper application of the proper means for that purpose. In other words, there were no facts proved from which an inference of negligence on the part of defendant could be legitimately drawn. On the other hand, it clearly appears from the plaintiff's own evidence that his injury was the result of his own mistake. He left his seat, stepped into the aisle, and commenced pulling off his overcoat, because, as he says, he thought the train was pulling out "for good." In fact, it was pulling up to the station "to stop." Under this mistake, he placed himself in such a position as not to be able to resist the force of the shock which was naturally incident, to the stop, fell, and was injured. But for it he would have remained in his seat, and in all human probability would have remained

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uninjured, as did the others in the car. For the consequences of his mistake the defendant cannot be held liable. It is true a faint effort was made by the plaintiff, in his examination in chief, to unload the responsibility for his mistake upon the defendant's station agent; but upon cross-examination he qualified his first statement as to what the agent said, by testifying that what the agent said was "that it would be better to go down there, as they were behind time, and they probably would not stop." This conversation took place when neither of them knew what the actual movement of the train would be, was mere advice based upon an opinion, upon which the plaintiff had no right to rely for his personal safety, and upon which his own evidence shows he did not rely, since he kept his seat until he thought the train had passed the stopping place, and even when he left his seat braced himself for an expected shock. It follows that the court did not err in sustaining the demurrer to the evidence, and its judgment is affirmed. All concur.

SOUTHERN RY. CO. v. VANDERGRIFF.

(*Supreme Court of Tennessee, Sept. 21, 1901.*)

[64 S. W. Rep. 481.]

Railroads—Negligence—Injuries to Passengers—Sufficiency of Evidence.*

Plaintiff, while a passenger in a caboose of defendant's train with the consent of the company, was thrown from his seat by a violent jerk of the train and injured. There was evidence that freight cars are jerked with much more violence than passenger coaches. The conductor remarked with an oath, at the time of the accident, that he did not see what the brakeman meant by putting on the brakes so hard. Evidence of other passengers corroborated plaintiff's version of the violence of the jerk: *held* sufficient to show actionable negligence on the part of the company.

Appeal from circuit court, Union county; W. R. Hicks, Judge.

Action by James Vandergriff against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jourolmon, Welcker & Hudson and D. D. Anderson, for appellant.

Templeton & Carlock and J. O. Sharp, for appellee.

WILKES, J. This is an action for damages for personal injuries. The plaintiff was a passenger, and was thrown from his seat to the floor of the car as the result of a violent jerk of the train, and was injured. The train upon which he was riding was a freight, with caboose attached, and he was in the caboose with other passengers by consent of the company.

*As to the care due passengers on freight trains, see 5 Am. & Eng. Enc. Law (2d Ed.) 589 et seq.; 2 Rap. & Mack's Dig. 321 et seq.; 9 Cent. Dig., col. 1029 et seq.

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The evidence is that freight cars are jerked in moving and stopping with much more violence than passenger coaches. It is also very plain from the record that the jerk which caused the fall and injury in this case was much more violent than usual, even in a freight train, and was noticed by all the passengers and conductor. The conductor remarked with an oath that he did not see what the brakeman meant by putting on the brakes so hard. Hon. John P. Rogers, who was a passenger, states that he was standing up, holding to the door with a tight grip, and all at once the train gave a violent and sudden jerk, and he fell also. He says: "It was an unusually hard jerk. * * * The train came to a sudden stop. It was not an ordinary jerk or lurch. I thought there was a collision. I was thrown on my back. I have never experienced such a jerk before or since." The evidence tends to show that plaintiff was ruptured by the shock or fall, or both. He became very sick and went to bed, has not been able to work since, and is permanently injured. The tendency of his injury, as stated by the physician, is to grow worse with time. There was a verdict for plaintiff for \$1,000. There was a remittitur of \$250, and judgment for \$750 and costs. The railroad company has appealed, and assigned as error that there is no evidence to support the verdict. We think the assignment not well made. The plaintiff was on the caboose at the invitation and by the consent of the railroad company, and had paid his fare. It was to be expected that the jerks and lurches of the freight train would be more severe than that of a passenger train, but, having accepted passengers upon such a train, the company was obliged to so operate it as to insure them from any unusual or unnecessary jerks or lurches. The facts in this case show a want of caution in operating the train, such as surprised the conductor and called forth his emphatic condemnation and protest. The evidence of other passengers fully corroborates the plaintiff's version of the violence of the jerk, and we think there is ample proof of actionable negligence. The judgment is affirmed, with costs.

DOOLITTLE v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, Aug. 5, 1901.*)

[40 S. E. Rep. 133.]

Injury to Passenger—Presumption of Negligence.*

Where there is evidence tending to show negligence on the part of defendant, though it is not shown to be the proximate cause of the injury to the passenger on its train, the presumption of negligence arising from the fact of the injury is sufficient to take the case to the jury, with the other testimony.

*Bassett v. Los Angeles Traction Co. (Cal.), 22 Am. & Eng. R. Cas., N. S., 5, and foot-note.

*Doolittle v. Southern Ry. Co***Same—Inviting Passenger Known to Be Ignorant of Traveling to Alight.***

Where a passenger notified the railroad company's employees that he was ignorant of railroad traveling, and they invited him to alight before the train arrived at the station, and he went upon the platform and was hurled therefrom by the sudden application of the brakes, there was sufficient evidence to go to the jury on the question of defendant's negligence.

Same—Liability.

Defendant railroad company is liable for injuries to a passenger when its negligence is the direct and proximate cause of the injury.

Same—Negligence and Contributory Negligence.†

A carrier is liable when its negligence, though combined with negligence on the part of the passenger, is still the proximate cause of the injury.

Same—Same.

A carrier is not liable for injuries to a passenger when the negligence of the passenger, though combined with the negligence of the carrier, is the proximate cause of the injury.

Same—Same.

A carrier is not liable when its negligence may be the proximate cause of the injury to the passenger, if the negligence of the passenger also operated as a proximate cause.

Instruction Not Based on Evidence.

An instruction not based upon the evidence is not ground for reversal, where it embodies a correct principle of law.

Same—Standing on Platform of Moving Car Not Negligence Per Se.‡

That a passenger was standing on the platform of a moving car is not negligence per se.

Inviting Passenger Known to Be Ignorant of Traveling to Alight.

Where a passenger unacquainted with railroad traveling, which fact he had stated to the defendant, alights from a moving train, in, as he thought, pursuance of an invitation to that effect, and is injured, it is for the jury to determine whether he was guilty of negligence.

Appeal from circuit court, Edgefield county; Townsend, Judge.

Action by Rebecca Doolittle, administratrix of Benjamin S. Doolittle, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. L. Abney, E. M. Thomson, and Sheppard Bros., for appellant.

Thurmond & Calhoun and Croft & Tillman, for appellee.

GARY, A. J. Rebecca Doolittle, as administratrix of her deceased husband, Benjamin S. Doolittle, brought this action on the 4th day of June, 1900, against the defendant, to recover damages for the alleged negligent killing of the said Benjamin S. Doolittle. The allegations of the complaint material to the consideration of the questions raised by the exceptions are

*See *Payne v. Nashville, etc., Ry. Co. (Tenn.)*, 22 Am. & Eng. R. Cas., N. S., 677 et seq.

†See *Cooper v. Georgia, etc., Ry. Co. (S. Car.)*, 22 Am. & Eng. R. Cas., N. S., 667; 5 Am. & Eng. Enc. Law (2d Ed.) 646 et seq.; 2 Rap. & Mack's Dig. 441 et seq.

‡See *Louisville & N. R. Co. v. Head (Ky.)*, 19 Am. & Eng. R. Cas., N. S., 302, and foot-note.

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as follows: “(8) That on the afternoon of the 13th day of December, 1899, Benjamin S. Doolittle purchased of an agent of the defendant, Southern Railway Company, in the city of Augusta, state of Georgia, a ticket from said city to the station of Bath, in Aiken county, state of South Carolina, a station on the line of the road of the South Carolina & Georgia Railroad Company, now and at the times hereinafter named operated by the defendant, Southern Railway Company, for which he paid the required fare or price in money, and became a passenger on said ticket on a train of cars of said defendant company on the date named to Bath, the aforesaid station. (9) Plaintiff is informed and believes and alleges that as the train of cars upon which the said Benjamin S. Doolittle was being carried as a passenger approached the said station of Bath, a regular station for taking on and putting off passengers, but before reaching said station, and when the said train was in full motion, a servant of the defendant, Southern Railway Company, acting within the scope of his agency and duties for the said defendant company, came into the coach in which the said Benjamin S. Doolittle was then and there being carried as a passenger, and negligently and carelessly called out, ‘All out for Bath,’ and negligently and carelessly invited the said Benjamin S. Doolittle then and there to alight from said coach; and the said Benjamin S. Doolittle, not believing that the said servant of the defendant company would invite him into a place of danger, and relying upon the skill and prudence of said servants of defendant, and the occasion being dark, and not knowing the train was moving rapidly, and not knowing he was going into a place of danger, and believing that the said train had reached the said station of Bath, left the coach in which he was riding as a passenger and went upon the platform of said coach, in response to and in obedience to said calling out and invitation of the said servant of defendant, preparatory to alighting from said coach; and that, immediately after reaching said platform, brakes were suddenly, carelessly, and violently applied by the servants of the said defendant company in order to stop said train of cars at Bath station, and the speed of the said train was thereby suddenly, negligently, carelessly, and violently checked; and the said Benjamin S. Doolittle, by reason of the said negligent and careless calling out by the servants of defendant, ‘All out for Bath,’ while the train was in full motion, and by reason of having been carelessly and negligently invited to alight from said train as aforesaid while the same was in full motion, and by reason of the brakes having been negligently, carelessly, and violently applied as aforesaid, and by reason of having been told by an agent of defendant to alight from said train when an agent called out, ‘All out for Bath,’ the said Benjamin S. Doolittle was hurled and precipitated from the platform of the said coach of defendant’s train aforesaid to and against the ground, and was thereby then and there carelessly and negli-

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gently mangled and killed, in the county of Aiken and state aforesaid, about fifty yards from and before the said train reached the said station of Bath. (10) Plaintiff is informed and believes and alleges that said Benjamin S. Doolittle, after getting on board of the said train of cars, and after being received as a passenger thereon, notified the agent of the defendant company, acting within the scope of his agency, that he, the said Benjamin S. Doolittle, had never before ridden on a train, and asked the said agent to let him know when the said train arrived at the said station of Bath, to which station he had a ticket; and he was told by the said agent of the defendant company that when an agent of said defendant called out, 'All out for Bath,' the train would be at that station, and he must alight therefrom." The complaint further alleges that the death of the said Benjamin S. Doolittle was the result of said negligent and careless acts of the defendant's servants hereinbefore set out. The defendant pleaded two defenses: First, a general denial; and, second, that the alleged death of plaintiff's intestate was not caused by any negligence or carelessness on its part, but occurred from and was caused by the want of care, neglect, and default of the said Benjamin S. Doolittle, plaintiff's intestate, in going out upon the platform of said train at the time and place he did while the same was in motion, and in attempting to alight from its train at the time and place and in the manner he did. The jury rendered a verdict in favor of the plaintiff.

The defendant appealed upon exceptions, the first of which is as follows: "First. Excepts because the presiding judge erred in not granting defendant's motion for nonsuit upon the grounds (1) that no evidence had been offered by plaintiff showing or tending to show any negligence on the part of the defendant which was the proximate cause of the death of the deceased; (2) that there was an entire failure of proof as to material allegations of negligence in the complaint; (3) that assuming negligence in the defendant, for the purpose of the motion, there was but one inference that could be drawn from the testimony,—that the contributory negligence of the deceased was the proximate cause of his death, without which the injury would not have occurred."

The motion for nonsuit was based on three grounds, which will be considered in regular order:

1. It will be observed that the first ground of the motion was not founded upon the fact that there was a failure of testimony to show negligence on the part of the defendant, but negligence which was the proximate cause of the death of the deceased. Whenever there is any evidence whatever of negligence on the part of a railroad company that would render it liable in damages for an injury, a nonsuit will not be granted, even though the testimony should show that there was negligence likewise on the part of the plaintiff. It is for the jury, under such circumstances, to determine the proxi-

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mate cause of the injury. In the case of *Boatwright v. Railroad Co.*, 25 S. C. 128, Mr. Chief Justice McIver, in delivering the opinion of the court, says: "The third question, that of contributory negligence on the part of the plaintiff, has been so frequently held in this state to be a matter of defense, which cannot be considered on a motion for nonsuit, that, whatever may be the rule elsewhere, it is scarcely necessary to consider the question. The only question which can be considered by the court upon a motion for a nonsuit is whether there is an entire failure of testimony to sustain all or any one of the points necessary to be established in order to enable the plaintiff to maintain his action. Unless there is such a failure, the motion must be refused; for, where there is any testimony pertinent to or tending to sustain the plaintiff's case, such testimony must be submitted to the jury, to pass upon its truth and determine its sufficiency. So that, even where the testimony adduced by the plaintiff may tend to show contributory negligence on his part, as well as negligence on the part of the defendant, the judge has no power to grant a nonsuit; for that would involve the necessity of passing upon the truth of the testimony tending to show contributory negligence, as well as upon its sufficiency for that purpose, both of which are, under our constitution, exclusively within the province of the jury, and to that tribunal, therefore, such questions must necessarily be submitted." It cannot be successfully contended that the only inference to be drawn from the testimony is that the negligence of Doolittle was the proximate cause of his injury, because the law raises a presumption that injury to a person while a passenger on a railroad train was caused by the negligence of the railroad company. As this proposition is strenuously contested by the appellant's attorney, and as several of the exceptions are dependent upon it, we will quote somewhat at length from the case of *Steele v. Railroad Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756, in which Mr. Justice Jones, delivering the opinion of the court, uses this language: "The circuit court refused to charge appellant's request as follows: 'The burden is upon the plaintiff to show that the railroad in this case was negligent. Negligence must rest upon the actual facts as shown by the evidence, and must not depend upon conjecture or surmise; and in the case of a railroad accident, where the evidence discloses the facts and circumstances thereof, there is no presumption of negligence.' The court charged as follows: 'Where a passenger is injured on a railroad, there is, from that fact alone, prima facie evidence of neglect in the management of the road, which evidence the railroad company is bound to rebut.' This refusal to charge is the basis of the first and second exceptions. In reference to this subject the circuit court explicitly charged the jury that the presumption was rebuttal, and that the jury must determine the question of negligence from the facts and circumstances

of the case. It will be noted that the charge complained of is in the exact language quoted from the case of *Hegeman v. Railroad Co.*, 16 Barb. 353, quoted by Judge O'Neill, with entire approval, in *Zemp v. Railroad Co.*, 9 Rich. Law, 89, 64 Am. Dec. 763, wherein it was held that proof that a passenger had been injured on a railroad is prima facie evidence of neglect. This learned judge, referring to *Danner's Case*, 4 Rich. Law, 334, 55 Am. Dec. 678, said: 'Surely, if a prima facie case of negligence is made out by showing the fact that stock was killed or injured on the railroad, much more ought the same result to follow from a passenger being injured. For, as to him, the company undertakes to carry safely as far as human care and foresight will go. This liability can only be discharged by showing that all reasonable skill and diligence have been employed. *McClenaghan v. Brock*, 5 Rich. Law, 17.' While this rule is regarded as too broad by some courts of high authority, we believe it is sustained by reason and the weight of authority. See cases collated on note, 5 Am. & Eng. Enc. Law, 623. The reasons for the rule are: (1) The contractual relation between the carrier and passenger, by which it is incumbent on the carrier to transport with safety; hence the burden of explaining failure of performance should be on the carrier. (2) The cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. (3) Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a presumption that such care is wanting." As there was evidence of negligence on the part of defendant, arising from the presumption hereinbefore mentioned, and as it is the province of the jury to determine the question of proximate cause, the first ground cannot be sustained.

2. We proceed to the consideration of the second ground of the motion for nonsuit. The acts of negligence alleged in the complaint may be summarized as follows: First, that the defendant, after being notified by Doolittle of his utter ignorance of railroad traveling, and instructing him to alight when the station was announced, negligently invited him to alight before the train arrived at the station, by which he was misled and injured; second, that, immediately after he reached the platform of the car, brakes were suddenly, violently, and negligently applied in order to stop the train at Bath, whereby the speed of the train was checked, and he was hurled from the platform, mangled, and killed. The ignorance of Doolittle made it necessary that he should have special assistance, and he took the precaution to notify the defendant of this fact. This made it the duty of the defendant to render such assistance. *Madden v. Railway Co.*, 41 S. C. 440, 19 S. E. 951, 20 S. E. 65. As has just been stated, there

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was evidence of negligence, arising from the fact that Doolittle was injured while a passenger on defendant's train of cars. But, apart from this presumption, there was testimony tending to sustain the allegations of negligence.

3. We will next consider the third ground of the motion for nonsuit. This ground is disposed of by what was said in considering the other grounds.

The second, thirteenth, and fourteenth exceptions were argued together, and will be considered in the same manner. They are as follows: "(2) Excepts because the presiding judge erred in charging plaintiff's fifth request, which was as follows: 'Where a passenger is injured on a railroad by the railroad company, there is from that fact alone prima facie evidence of neglect in the management of the road, which evidence defendants are bound to rebut, or they would be liable in damages for the injury.' Said request did not properly state the rule. It should have been limited to injuries caused by some agency or instrumentality of the railroad company. It was, therefore, as an abstract proposition, erroneous. And, further, it is submitted that, plaintiff having shown the facts and circumstances surrounding the injury, there was no presumption of negligence arising therefrom." (13) Excepts because the presiding judge erred in not charging defendant's fifteenth request, which was as follows: 'There is, under the law, no presumption of negligence on the part of the railroad company upon the mere proof of the death of a passenger.' Said request contains a correct proposition applicable to the case. (14) Excepts because the presiding judge erred in not charging defendant's sixteenth request, which was as follows: 'Where the injury is not proven to have been caused by some appliance, agency, or instrumentality of the railroad company, there is no presumption of negligence on the part of the railroad company upon the mere proof of the fact of an injury to, or death of, a passenger.' Said request contains a correct proposition of law applicable to the case, and should have been charged." The questions raised by these exceptions are disposed of by what was said in considering the first exception, except that part of the second exception in which it is submitted "that, plaintiff having shown the facts and circumstances surrounding the injury, there was no presumption of negligence arising therefrom"; and this question is decided adversely to the view for which the appellant contends by the case of *Mack v. Railroad Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913.

The third, eleventh, and twelfth exceptions will be considered together, and are as follows: "(3) Excepts because the presiding judge erred in charging plaintiff's sixth request, which was as follows: 'Even if a passenger be guilty of negligence in placing himself in a dangerous position, it will not bar his right to recover damages, if the injury was caused

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directly and proximately by the negligence of the carrier.' And by charging the jury in connection therewith: 'If both are guilty, it will not bar his right to recover, if he is guilty, unless his negligence is the proximate cause of the injury. Then he cannot recover.' It is submitted that said charges failed to state the law of contributory negligence,—an important element of said charge." "(11) Excepts because the presiding judge erred in charging the jury: 'If, on the other hand, a passenger is injured, and, even though he be guilty of negligence, if his negligence is not the proximate cause of the injury, the company cannot escape liability. He cannot be deprived of the right to claim damages because of negligence, unless his negligence, if he should be negligent, operating with the negligence of the company, if there should be such, becomes the proximate cause of the injury.' It is submitted that contributory negligence exists when the injury has resulted from the negligence of the defendant as a concurring, proximate cause, and that contributory negligence to any extent will always defeat a recovery. The above charge, repeatedly made to the jury, limits the defense to cases where the negligence of the passenger is the proximate cause of the injury. (12) Excepts because the presiding judge erred in charging the jury as follows with reference to contributory negligence, to wit: 'I charge you, if there is negligence on the part of both, the plaintiff, if his negligence, combined with that of the defendant, was the proximate cause, he cannot recover, because it does not make out a case. As I understand the law, it is based upon the preponderance of the evidence. I am not talking about the evidence in this case, but the reason upon which the law is based.' Said charge is erroneous for the reason stated under exception 11, and is further erroneous in stating the reason of the rule, which is not based upon the preponderance of the evidence, but it is that the law cannot measure how much of the damage is attributable to the plaintiff's own fault." Questions involving negligence and the proximate causes of injury are among the most important and difficult of solution that are presented to the courts for adjudication. Without undertaking to review the authorities, we will state the principles deducible from them: (1) That the defendant is liable when its negligence is the direct and proximate cause of the injury; (2) that the defendant is not liable when the negligence of the plaintiff is the direct and proximate cause of the injury; (3) that the defendant is liable when its negligence, though combined with negligence on the part of the plaintiff, is still the proximate cause of the injury; (4) that the defendant is not liable when the negligence of the plaintiff, though combined with the negligence of the defendant, is nevertheless the proximate cause of the injury; (5) that the defendant is not liable, even though its negligence may be a proximate cause of the injury, if the negligence of the plaintiff likewise operates as a proximate cause. The rulings and

charge of his honor the presiding judge are in harmony with these principles.

The fourth exception is as follows: “(4) Excepts because the presiding judge erred in charging plaintiff’s eighth request, which was as follows: ‘A plaintiff may maintain an action for injuries caused by the negligence of a carrier, even though he was guilty of negligence himself, if such negligence was caused by sudden peril and terror in the situation wherein he has been placed by defendant’s negligence.’ Said request was inapplicable, misleading, and confusing to the minds of the jury, as there was not a tittle of evidence upon which to base it, and it was error to so charge the jury.” It is not contended that the request embodied an erroneous principle of law, but that it was inapplicable, misleading, and confusing, as there was no evidence upon which it was based. When the charge is considered in its entirety, there is no reason why the jury should have been misled by the request.

The fifth and eighth exceptions will be considered together, and are as follows: “(5) Excepts because the presiding judge erred in charging plaintiff’s ninth request, which was as follows: ‘An injury resulting to a passenger while standing on the platform of a moving coach is not per se negligence in the passenger for taking such a position, but all the circumstances surrounding the case are to go to the jury, and they are to determine whether the railroad is liable in damages.’ It is submitted that, if such a passenger was voluntarily and unnecessarily standing on the platform of a moving coach, it was per se negligence in him.” “(8) Excepts because the presiding judge erred in not charging defendant’s ninth request, which was as follows: ‘If a passenger voluntarily goes out upon or stands on the platform of a railroad car while the train is in full motion, and he suffers injury, due in part to the fact of his occupying such a position, he cannot recover against the railroad company for injury received therefrom.’ Said request, it is submitted, contained a correct proposition of law applicable to the case, and should have been charged.” The case of *Martin v. Railroad Co.*, 51 S. C. 150, 28 S. E. 303, shows that these exceptions cannot be sustained.

The sixth exception is as follows: “(6) Excepts because the presiding judge erred in modifying defendant’s fifth request, which was as follows: ‘That degree of care which exonerates a person from contributing to the negligence that has caused him his injury does not depend upon his age or physical or mental condition, but must be measured by some common standard, and that standard is a prudent, reasonable man in possession of ordinary senses and capacities.’ Said request was modified as follows: ‘I charge you, that, as a general proposition, is correct, if made known to the company; or if any passenger is aged, infirm physically or mentally, and needs special attention, it is the duty of the company to give that person special attention.’ The request

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stated a correct principle of law, applicable to the case, and should have been charged as submitted. As modified, its force was destroyed, and different propositions confused." The case of *Madden v. Railway Co.*, 41 S. C. 440, 19 S. E. 951, 20 S. E. 65, shows that this exception cannot be sustained, under the facts of this case.

The seventh exception is as follows: "Excepts because the presiding judge erred in not charging defendant's seventh request without qualification, said request containing a correct proposition of law applicable to the case. Said request was as follows: 'That it is negligence, as matter of law, for a passenger to attempt to alight from a passenger train moving at full speed, or a rapid rate of speed.'" Whether there was negligence depends upon the facts of the particular case. In this case Doolittle, through his ignorance, which he made known to the defendant, thereby rendering special assistance necessary, thought he was alighting in pursuance of an invitation to that effect. It was for the jury to determine whether he was guilty of negligence.

The ninth and tenth exceptions are as follows: "(9) Excepts because the presiding judge erred in not charging defendant's tenth request, which was as follows: 'The announcement of the name of a station is not of itself an invitation for passengers to alight, but is only information that the train is approaching their destination, so that they may get off when the train stops. It is no invitation to alight when the cars are in motion.' Said request contained a correct proposition of law, and should have been charged. It conveyed the idea that the announcement of the name of a station was but the fulfillment of a legal duty resting upon the railroad company, and was not an invitation to the passengers to alight while the train was in motion. (10) Excepts because the presiding judge erred in not charging defendant's eleventh request, which was as follows: 'The announcement of a station by a conductor or train hand, with the further announcement of "All out" for that station, is not such an instruction, order, or command to leave as will justify a passenger in getting off a train in motion.' Said request should have been charged for the reason stated under exception 9, supra, and for the further reason that passengers have no right to assume the train has reached the place designed for passengers to alight simply because of such announcements." These exceptions are disposed of by what was said in considering the other exceptions,—especially the seventh.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE and JONES, JJ., concur in the result.

On Rehearing.

(Nov. 29, 1901.)

PER CURIAM. After a careful consideration of this peti-

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tion, we are unable to find that any material fact or principle of law has either been overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

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(*Court of Appeals of Kentucky, Dec. 19, 1901.*)

[66 S. W. Rep. 25.]

Carriers of Live Stock Not Insurers.*

A railroad company undertaking to transport live stock is liable for the negligence of its agents and servants, but not as insurer.

Burden of Proving Negligence on Shipper Undertaking Care of Stock.†

Where the shipper undertakes to care for the stock, and to load and unload it, the burden of proof is on him to show that any injury was the result of the carrier's negligence.

Negligence—Question for Jury.

Where there was testimony tending to show that a racing mare, while being transported by defendant railroad company, was thrown down seven or eight times by reason of the unusual manner in which the train was handled in going around curves, the question of negligence was for the jury.

Value of Live Stock—Weight of Evidence.

Courts and juries cannot disregard unimpeached and uncontradicted testimony as to the value of live stock killed or injured by the negligence of a carrier.

Continuance.

Defendant corporation was entitled to a continuance to enable it to take the deposition of a material witness in another state, where its attorney filed his affidavit stating that he had for several months made diligent inquiry to locate the witness, and had only succeeded in doing so the day before the affidavit was made; especially as plaintiff testified on the trial that he had endeavored to locate the witness, but had failed to do so, though more anxious to take his deposition than defendant was.

Appeal from circuit court, Jefferson county, law and equity division.

“Not to be officially reported.”

Action by M. R. Harned against the Louisville & Nashville Railroad Company to recover damages for breach of a contract for the shipment of live stock. Judgment for plaintiff, and defendant appeals. Reversed.

Lyttleton Cooke and Edward W. Hines, for appellant.

Jas. C. Poston and J. P. O'Meara, for appellee.

*See *Cooper v. Raleigh & G. R. Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 412, and note, 419 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 443 et seq.; 1 Rap. & Mack's Dig. 745 et seq.; 9 Cent. Dig., col. 819 et seq.

†See *Cooper v. Raleigh & G. R. Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 412, and notes, 423 et seq.; 1 Rap. & Mack's Dig. 811 et seq.; 9 Cent. Dig. 871 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 469 et seq.

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which testimony showed that the damage the appellee sustained was greater than that fixed by the jury. No countervailing testimony was offered. It is unreasonable to expect juries and courts to disregard uncontradicted and unimpeached testimony as to the value of stock claimed to be injured or killed by carriers.

The attorney for appellant filed his affidavit, in which he said that he had made diligent inquiry for some months to locate the whereabouts of Dr. Asa N. McQueen, a veterinary surgeon, who had treated the mare after her injury, and that he had only succeeded in finding his whereabouts the day before the affidavit was made, and upon that affidavit he moved the court to continue the case. The court overruled his motion, presumably upon the idea that the appellant had not shown diligence in ascertaining the whereabouts of McQueen. We are of the opinion that the court erred in not granting a continuance, as the testimony of McQueen was competent, and the appellant was entitled to have the jury determine what weight should be attached to it. We are of the opinion that the affidavit sufficiently showed that the appellant had used diligence to find McQueen before the trial. The appellee, on the trial of the case, said he had been endeavoring to locate him, but had failed to do so, and that he was more anxious to take his deposition than the appellant.

The judgment is reversed because the court overruled appellant's motion for a continuance.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v. COMMONWEALTH OF KENTUCKY.

*Argued November 9, 1900. Ordered for Reargument March 25, 1901.
Reargued November 8, 11, 1901. Decided January 6, 1902.*

[22 Sup. Ct. Rep. 95.]

Construction of State Statute Giving Different Effect to Similar Language in Interstate Commerce Law Binding on Supreme Court.

The construction put by the Kentucky court of appeals upon the provisions of Ky. Const. § 218, by which a different effect is given to it than to similar language in the interstate commerce law, is binding upon the Supreme Court of the United States in a case governed by the state Constitution.

Constitutionality of Statute Prohibiting Carriers from Charging More for Short Than Long Haul.

The equal protection of the laws is not denied to a railroad company by Ky. Const. § 218, and Ky. Gen. Stat. 1894, § 820, which prohibit the companies from charging more for a shorter than for a longer haul, except by permission of the railroad commission in special cases after investigation.

Same.

The guaranty of due process of law by the Federal Constitution is not violated by Ky. Const. § 218, and Ky. Gen. Stat. 1894, § 820, giving a railroad commission power to make exceptions in particular cases, after investigation, from the general prohibition of greater rates for shorter than for longer hauls. Such commission is not to

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be deemed a mere administrative body, but it is a constitutional tribunal, the decisions of which are made conclusive, and not reviewable by the courts.

Same.

A railroad company accepting its charter subject to the provisions of Ky. Const. § 218, prohibiting greater charges for shorter than for longer hauls, except when permitted by the railroad commission, is as much subject to the provisions for exoneration from that prohibition as to the prohibition itself, and cannot claim that it has any implied contract exemption from these provisions by virtue of its charter and the consequent right to charge reasonable rates for its service.

Interference with Interstate Commerce.

Any interference with interstate commerce by the enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote and indirect to be regarded as an unconstitutional interference with interstate commerce.

In Error to the Court of Appeals of the State of Kentucky to review a decision affirming a judgment of conviction on an indictment against a railroad company for charging unlawful rates. Affirmed.

See same case below, 22 Ky. L. Rep. 328, 57 S. W. 508.

Statement by MR. JUSTICE SHIRAS:

At the January term, 1895, of the Marion county circuit court of the state of Kentucky, an indictment was found against the Louisville & Nashville Railroad Company, a corporation of the state of Kentucky, for an alleged violation of § 218 of the Constitution of the state, and § 820 of the Kentucky Statutes, in charging more for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, than to Louisville and Elizabethtown, Kentucky, over railroads which the company were operating under its charter. The indictment alleged that it was filed upon the recommendation of the state railroad commission. The trial resulted in a judgment of conviction and a fine of \$300, which, on appeal, was, on May 20, 1899, affirmed by the court of appeals. [21 Ky. L. Rep. 232, 51 S. W. 164, 1012.] From that judgment of the court of appeals a writ of error was allowed by the chief justice of that court on June 28, 1899, and the case was brought to this court.

Messrs. William Lindsay, Walker D. Hines, and H. W. Bruce for plaintiff in error.

Mr. H. W. Rives submitted the case for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court:

This case is here on a writ of error to a judgment of the court of appeals of the state of Kentucky, affirming a judgment of the circuit court of Marion county, Kentucky, sentencing the Louisville & Nashville Railroad Company to a fine of \$300 for an alleged violation of a statute of that state which declares, among other things, that it shall be unlawful for any person or corporation owning or operating a railroad in the state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like

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kind, under substantially similar circumstances and conditions, for a shorter than for longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

This statute is based upon § 218 of the Constitution of the state of Kentucky, adopted in 1891. The statute, which is § 820 of the Kentucky Statutes, and § 218 of the Constitution, are set forth in full in the report of the case of *McChord v. Louisville & N. R. Co.*, 183 U. S. —, post, —, 22 Sup. Ct. Rep. —, and cognate cases, recently decided by this court, and need not be here copied at length.

Those cases were here on appeal from final decrees of the circuit court of the United States for the district of Kentucky, enjoining the railroad commission of the state from enforcing against the complainants, of which the Louisville & Nashville Railroad Company, the plaintiff in error in the present case, was one, the provisions of an act of the commonwealth of Kentucky approved March 10, 1900, entitled, "An Act to Prevent Railroad Companies or Corporations Owning and Operating a Line or Lines of Railroad, and its Officers, Agents, and Employees, from Charging, Collecting, or Receiving Extortionate Freight or Passenger Rates in This Commonwealth, and to Further Increase and Define the Duties and Powers of the Railroad Commission in Reference thereto, and Prescribing the Manner of Enforcing the Provisions of this Act and Penalties for the Violation of its Provisions."

The occasion of the passage of this act of March 10, 1900, was a decision of the court of appeals of Kentucky holding that § 816, which declared that any railroad company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that state was guilty of extortion, could not be enforced as a penal statute for want of certainty. *Louisville & N. R. Co. v. Com.*, 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129.

The effort was made in the circuit court of the United States, and successfully, to have it held that by the said act of March 10, 1900, § 819, in so far as it provided an action by way of information, and to liability in damages, and that indictments should be made only on the recommendation or request of the railroad commission, was repealed by necessary implication; and that, accordingly, the order of the commission, fixing the rate, toll, or compensation they may charge, was self-executing, and that no duty to enforce it was imposed on the commission; that the railroad companies were shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; that on the trial of indictments for failure to observe the rates made by the commission, the courts cannot entertain any inquiry as to the reasonableness of rates so fixed, because such inquiry is unwarranted by the statute, and therefore illusory and worthless; and that, even if the question of con-

stitutionality could be raised in defense, yet that, if the order of the commission were permitted to be entered of record, the companies, if they did not comply, would be at once exposed to innumerable prosecutions and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute was upheld.

It was, however, held by this court that it was not the intent or effect of the act of March 10, 1900, to repeal those provisions of § 819 requiring indictments to be found only on the recommendation of the commission, nor to circumscribe, in this particular, the general duty of the commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the court of appeals of Kentucky in the case of Illinois C. R. Co. v. Com., decided while the appeals from the decrees of the circuit court of the United States were pending in this court. In that case the railroad company was indicted under § 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the railroad company should be exonerated as provided in that section, and the court of appeals held that "to allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. . . . The long and short haul matter is only another form of undue discrimination and preference, which are provided for by § 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see Gen. Stat. p. 1021), which was in force at the time of the adoption of the Constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the state should be looked to in these matters, and that the railroad commission must first determine them before the general juries of the state should find indictments." [23 Ky. L. Rep. 1162, 64 S. W. 977.]

The conclusion reached by this court, therefore, was that the duty of enforcing its rates rests on the commission, and that there was no basis for interposition by a court of equity before the rates were fixed at all; and that whether, after the rates have been determined by the commission, their enforcement could be restrained, was a question not necessarily presented for decision in those cases; and, accordingly, the decrees of the circuit court were reversed with a direction to sustain the demurrer and dismiss the bills.

In the case now in hand the indictment was found, not in advance of any action by the railroad commission, but on its recommendation. Hence the question of the validity of the provisions of the Constitution and laws of the state of Ken-

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tucky under which these proceedings were had is properly before us. Of course, our consideration of it must be restricted to its Federal aspect; in other words, we are to inquire whether the state enactments, constitutional and statutory, in the particulars involved in this controversy, and under the construction given them by the court of appeals, are in conflict with the 14th Amendment of the Constitution of the United States.

At the trial of the indictment it was not seriously disputed that the defendant company had, at the time and place alleged, charged and received for the carriage and transportation of coal over its line of road a greater compensation for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, without having been authorized by the railroad commission so to charge, and after the commission, upon investigation, had refused so to do.

But certain facts which were alleged to show that the circumstances and conditions under which the charges in question were made and received were not substantially similar with those ordinarily obtaining, and thus to show that the charges objected to were just and reasonable, were offered in evidence by the railroad company, and excluded from the jury by the trial court, which gave to the jury what amounted, in legal effect, to a peremptory instruction to find the defendant company guilty as indicted. The jury accordingly returned a verdict of guilty, fixing the fine at \$300, for which judgment was rendered, and an appeal was taken by the defendant company from that judgment to the court of appeals.

It was contended in the courts below and here that as § 218 of the Constitution of the state of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the Interstate Commerce Act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the Federal courts; and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the state.

Such contention might seem reasonably to have been urged in the state courts, but, as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments

to be that found in them by the state courts. The prevailing view in the court of appeals was thus expressed by Judge Hobson:

“Appellant transported coal from Altamont to Louisville at \$1.00 per ton, and to Elizabethtown at \$1.30 per ton, while it charged \$1.55 per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter and made an order in writing declining to exonerate appellant from the operation of the provisions of § 820, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecuted this appeal to reverse the judgment imposing a fine upon it of \$300.

“Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to noncompetitive points like Lebanon were reasonable, and were unaffected by the reductions referred to, which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial, on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of § 218 of the Constitution. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not in another, and we are referred to numerous decisions of the Federal courts so holding. On the other hand, it is contended for the state that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

“The precise question thus presented was determined by this court in the case of *Louisville & N. R. Co. v. Com.*, 20 Ky. L. Rep. 1380, 43 L. R. A. 541, 46 S. W. 707, where the construction of the section adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered, and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation.” [21 Ky. L. Rep. 234, 51 S. W. 165.]

In order fully to understand the position of the court of appeals it may be well to quote a portion of the opinion of that court in the case of *Louisville & N. R. Co. v. Com.*, 20 Ky. L. Rep. 1380, 43 L. R. A. 541, 46 S. W. 707, referred to in the court's opinion in the present case:

“The railroad commission was therefore created to meet the

emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of § 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit such suspension or relaxation in special cases. While the commission is thus, to that extent, free from judicial interposition, it cannot of course nullify, or, except in special cases, at all suspend operation of, § 218; and though the railroad commission be invested with this unusual power, it must be treated as a constitutional power with which the court cannot interfere."

With the meaning thus attributed to § 218 of the Constitution, it is strenuously contended on behalf of the plaintiff in error "that said section has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undercharges, or the promotion of the safety, health, convenience, or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is therefore in conflict with the 14th Amendment of the Constitution of the United States; and since the railroad company has built its railroads in the state of Kentucky, upon the faith of a charter granted it by the state authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such construction of § 218 would impair the obligation of that contract."

To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitu-

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tion of the United States; and that in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. Railroad Commission Cases, 116 U. S. 345, sub nom. *Stone v. Farmers' Loan & T. Co.*, 29 L. Ed. 649, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 38 L. Ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. Rep. 565.

We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power,—one that should not be resorted to unless the reason for doing so is clear and unmistakable.

As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the circuit court of Marion county, and when the court of appeals disposed of it, no power in the railroad commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the commission by the act of March 10, 1900; and it was to restrain the railroad commission from taking action under that act that bills in equity were filed by the Louisville & Nashville Railroad Company and other railroad companies in the circuit court of the United States. But in the present case we have only to do with the question of the validity of the action of the railroad commission's proceeding under § 218 of the Constitution and § 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when authorized by the commission to charge less for longer than for shorter distances. As we have seen, this court held, on the appeals from the circuit court of the United States, that it was not competent for courts of equity to interfere with the action of the commission in respect to fixing rates before the rates were fixed at all, and when it could not

appear whether the companies would have any reason to complain of them.

Our present duty is to consider only the objections to the validity of the long and short haul clauses in the Constitution and the statutes.

It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a state and its citizens.

This court, then, is not concerned with the wisdom of the people of Kentucky when they declared in their Constitution that it should be unlawful for any person or corporation owning or operating a railroad in that state to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the court of appeals of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the state to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the state, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.

When the citizens of Kentucky voluntarily seek and obtain a grant from the state of a charter to build and maintain a public highway in form of a railroad, it would seem to be evident that it takes, holds, and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that in a given case a railroad company may be able to show that the state has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the states. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a

company voluntarily formed to carry on business wholly within a state, we are unable to see how such a company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the state.

It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the state, yet that their ownership of such roads is property, and, as such, is protected from arbitrary interference by the state. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the state. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character, the company would be without the protection which courts of equity have heretofore given in cases of that description. What we now say is that a state corporation voluntarily formed cannot exempt itself from the control reserved to itself by the state by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal courts, in respect to the long and short haul clause in the state Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another; and the remedy adopted by the state was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the state desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the state, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

It is further contended that the indictment and proceedings in this case were void because of the nature of the proviso in § 218 of the Constitution. That proviso is in the following words: "Provided that, upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the

transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this state, may be relieved from the operations of this section."

The argument is that, "even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet, where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to intrust the dispensation of the right to engage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will, in any and all cases, without judicial review or control."

But if it be competent for the state, as this argument supposes, to wholly forbid, in every case and by every carrier the charging of more for a short than a long haul, it is not easy to see why the state may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. Such a provision is *ex gratia*, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation. Such an exercise of discretion by the railroad commission would be no more arbitrary than if the Constitution had authorized the legislature to allow in special cases a greater charge for the shorter than for the longer distance, and to prescribe the extent of such excess. We are not prepared to accept the view that the railroad commission, in acting under § 218, is merely an administrative body, and as such subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects to resort to the commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never

been held that the finality of their findings made the action of the appraisers unconstitutional or void. *Shoemaker v. United States*, 147 U. S. 282, 305, 37 L. Ed. 170, 187; 13 Sup. Ct. Rep. 361.

The plaintiff in error did not choose to avail itself of the right to apply for relief to the railroad commission, perhaps for the reason that doing so might be regarded as an acquiescence in or waiver of the right to object to the validity of the proviso.

However this may be, it is difficult to see how a Federal question is presented by the apprehensions which the plaintiff may entertain that a resort to the commission might be futile. As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the Constitution; and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the state in its Constitution. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Railroad Commission Cases*, 116 U. S. 307, sub nom. *Stone v. Farmers' Loan & T. Co.*, 29 L. Ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

We are next to inquire whether the plaintiff in error has been exonerated from these constitutional conditions and regulations by a valid contract subsisting between it and the state.

We do not understand that the counsel for the plaintiff in error claims that, by any provision of its charter, power was given to the company to fix its own rates of charge, or to discriminate in its rates between different places on its line of railroad, and that the constitutional prohibition as to the long and short haul, subsequently enacted, operates, if enforced, as a withdrawal or defeat of that power.

No right, in express terms or by necessary implication, is pointed in the company's charter granting to the Louisville & Nashville Railroad Company the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter distance points. On February 14, 1856, there was passed a general act reserving to the state an unlimited power to amend all charters and amendments thereafter granted. Ky. Laws 1855-6, chap. 148. It is true that an amendment to plaintiff in error's charter was granted by an act passed February 28, 1860, by § 1 of which the board of directors were granted authority, "in their adjustment of tariff for freight and passengers, to make discrimination in favor of freights and passage for long over short distances." But it does not seem to be contended that by this amendment of 1860 an irrevocable contract was

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effected between the state and the company, which could not be affected by a subsequent constitutional enactment. It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be deemed to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.

But what is claimed is that a railroad company, by mere force of its legal organization and the construction of its road, has a necessarily implied power to fix reasonable rates, and especially has the right to differ rates when competition exists from rates applicable where there is no competition. Such rights, it is said, are essential to enable the company to engage in perfectly legitimate business, and hence that an interference therewith, even by a constitutional enactment, not only deprives the company of its property, or the reasonable use of it, but also impairs the obligation of the contract implied in the grant of its charter.

So far as the question of an implied contract is concerned, we perceive no distinction between the case of a railroad company incorporated before and that of one incorporated after the constitutional enactment in question. As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the state to regulate and control the grant in the interest of the public.

In *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267, 10 Sup. Ct. Rep. 34, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the state and the company as exempted the latter from the operation of the subsequently adopted Constitution of Pennsylvania; that a constitutional provision, as applied to the company, in respect to cases afterwards arising, did not impair the obligation of any contract between it and the state; and that the company took its charter subject to the general law of the state and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

The same principle was announced in *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55, 12 Sup. Ct. Rep. 346; and in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. Rep. 714.

In the absence, then, of any express prior contract between the state and the company, exempting the latter from future constitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the state, it is sufficient to say that we do not find in § 218 of the Constitution of Kentucky any impairment of an

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existing contract between the state and the plaintiff in error.

The final contention, that § 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.

It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state. *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 439, 39 L. Ed. 1043, 1045, 15 Sup. Ct. Rep. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. Ed. 953, 17 Sup. Ct. Rep. 532.

A discussion of this subject will be found in the opinion of this court in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 701, 40 L. Ed. 859, 16 Sup. Ct. Rep. 714, where the same conclusion was reached.

The judgment of the Court of Appeals is affirmed.

CARTER *et al.* v. WILMINGTON & W. R. CO. *et al.*

(*Supreme Court of North Carolina, Nov. 5, 1901.*)

[39 S. E. Rep. 827.]

Carriers—Freight—Refusal to Ship—Penalties—Separate Offenses.*

Under Code, § 1964, providing a penalty for a transportation company's refusal to ship freight tendered, and that a separate penalty may be recovered for "each article" refused, a railroad company refusing to transport a car load of cattle is liable to a separate penalty for each animal.

Appeal from superior court, Columbus county; Robinson, Judge.

Action by L. W. Carter and others against the Wilmington & Weldon Railroad Company and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Junius Davis, for appellants.

J. B. Schulken, for appellees.

*See notes at end of case.

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DOUGLAS, J. This case was here before on demurrer being reported in 126 N. C. 437, 36 S. E. 14. In view of what we then said, the answers of the jury to the first and third issues have reduced the case, as now before us, to narrow limits. Three out of the four exceptions insisted upon by the defendants raised the point that, in order to recover under the statute for separate penalties, it was incumbent upon the plaintiffs to tender the cattle separately. We think that this question was settled in our former decision, and cannot now be reopened by a second appeal, in the nature of a rehearing. If it were necessary to tender separately each individual article, in contemplation of law such article would be a distinct shipment, and the provision of the statute (Code, § 1964), saying that "each article refused shall constitute a separate offense," would have no meaning. The following extracts from our former opinion sustain our present view. We said, beginning on page 439, 126 N. C., and page 15, 36 S. E.: "The defendant contends, in effect, that the plaintiffs have no cause of action; * * * that but one penalty attaches for the refusal of the entire shipment offered. * * * The statute provides, in express terms, that each article refused shall constitute a separate offense; that is, a distinct violation of the law. The penalty attaches for such violation, and for each and every violation thereof. * * * To say that 'each article' meant simply the entire shipment offered would be equivalent to saying that it meant nothing, because it would add nothing to the previous part of the section. To say, further, that, even if each article constituted a separate offense, the statute did not intend a separate penalty, would impose upon the statute a construction utterly foreign both to its letter and spirit. The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public, not simply to the abstract public, but to each individual. Penalties are made cumulative so as to make it, under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should, under all circumstances, exactly equal the injury; while punishment, to be effective, must exceed the injury, or, at least, be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment, it might be cheaper for the carrier to pay a penalty of \$50 than to go to any extra expense and trouble to obtain the necessary cars. Moreover, the usual and primary meaning of the word 'article' is opposed to the idea that it means the entire shipment. * * * As we are of opinion that each head of cattle was a separate article in contemplation of the statute, the refusal of which was a separate offense, it follows that a separate penalty attached thereto. As there were thirty head of cattle refused,

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thirty separate penalties were incurred by the defendant." This seems to us to settle the present case.

Again, we say that this decision refers to the shipment of cattle, where each "article" is necessarily separate, and does not refer, directly or by analogy, to the innumerable small articles that may be inclosed in one package, where they can be neither seen nor counted. Such a case is not now before us, but we have no hesitation in saying that there is an essential difference between one nail in a keg of nails and one ox in a drove of cattle.

The shipment appears to have been made in entire good faith, and there is neither proof nor allegation of any fraudulent intent. The main defense seems to have been that all the defendant's available stock cars were then required for the transportation of two regiments of cavalry, but this issue the jury found against the defendant. Whether the instruction upon that issue can be sustained we are not called on to decide, as it was favorable to the defendant, and therefore not now under exception.

The defendant contends that it had no facilities for taking care of cattle, but it appears that it had the ordinary pens into which the cattle were driven by the plaintiffs. The law placed upon the defendant the imperative duty of receiving these cattle, and its refusal to receive is the gist of this action. It had five days after receipt in which to ship the cattle, and did ship them within that time. If, in the interval, the cattle had suffered from exposure and want of feed through no fault of the defendant, that would have been a defense to be pleaded in an action for damage to the cattle, which would have been essentially different from the one at bar.

We have carefully considered the defendant's exception to the exclusion of the letter of Richardson to Divine, and, after some hesitation, have come to the conclusion that there is no error in such exclusion, under the circumstances of this case. This letter was written by the station agent at Whiteville after the beginning of this suit, the sole foundation of which was his own unlawful conduct. While not a party to the suit, he was something more than a witness, and was deeply interested in defending the company from any loss arising from his own conduct, as well as in placing such conduct before his superiors in the light most favorable to himself. We are not passing upon the credibility of the witness, which is for the jury alone, but upon the natural bias which, consciously or unconsciously, is liable to affect all men under such circumstances. In any event, we do not see how the defendant has been injured by the exclusion of the letter. The jury found that the plaintiffs did not tender the cattle on August 8th, and that finding destroyed half the case. They also found that the defendant was not prevented from furnishing the cattle car by the exigencies of governmental service. Of this fact Richardson does not appear to have had any personal knowl-

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edge, and we do not see how his letter could be used to corroborate Borden, for which purpose, indeed, it does not seem to have been offered. In some respects the letter tends to corroborate the plaintiffs. It says, in part: "These parties were informed of our inability to get car. They insisted on shipping, and drove their cattle into the stock pen here after I had informed them that it was impossible to get car that day. They demanded a bill of lading, which, of course, I refused to issue, as we have no place to keep stock here." Is not that a practical admission of tender and refusal?

Another significant statement is that made by Borden, a witness for the defendant, who testified as follows: "I am now, and was in August, 1898, superintendent of transportation of the defendant companies. I had charge of the car supply and train service. A telegram came to me in my office in Wilmington from Mr. Lynch at Florence on the 9th of August, 1898, and one from Mr. A. S. Richardson, dated the 10th, asking for a stock car to be sent to Whiteville station. I sent the stock car to Whiteville on the 11th, by the first train, after I was notified of its importance."

In the absence of substantial error, the judgment is affirmed.

NOTES.

DUTY OF RAILROAD COMPANIES AS COMMON CARRIERS TO RECEIVE AND CARRY FREIGHT.

I. In General.

- A. Special Contract Not Required.
- B. Common Law.
- C. Test as to Whether Railroad Is a Common Carrier.
- D. Rules Purporting to Limit Duty.
 - 1. Shipper Cannot Be Required to Waive His Rights.
 - 2. Time of Receiving.
 - 3. Requiring Shipper to Employ Certain Hands to Load.
 - 4. Agreement between Carriers Not to Accept Freight Destined to Certain Points.
- E. Tender of Goods.
 - 1. Must Be Tender of Definite Amount.
- F. Must Be Actual Refusal.
- G. English Rule Not Applicable to Wagoners.
- H. Reason for Existence of Rule.
- I. Application of Rule.
 - 1. Cars.
 - 2. Cars of Other Companies.
 - a. Duty of Receivers.
 - b. Defective Cars.
 - c. Connecting Carrier May Transfer Live Stock to Its Own Cars.
 - 3. Coal.
 - 4. Freight from Connecting Lines.
 - 5. Live Stock.
- J. Route and Mode of Shipment.
- K. Discrimination.
 - 1. General Rule.
 - 2. Time of Shipment.
 - 3. Common Law.
 - 4. Exclusive Right to Ship.
 - 5. Agreement to Transport Coal for Collieries Exclusively.
 - 6. Cannot Discriminate in Favor of Connecting Line.

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7. Receiving Freight on Side Tracks at Private Warehouse.
8. Relief Goods for Chicago Fire Sufferers.
- II. Excuses for Refusal to Receive and Carry Freight.
 - A. Character of Goods.
 1. In General.
 - a. Statutes.
 2. Circus Property and Performers.
 3. Dangerous Substances.
 4. Dogs.
 5. Glassware.
 6. Intoxicating Liquor.
 7. Live Pigeons.
 8. Money and Bank Bills.
 9. Perishable Goods.
 10. Prohibited Articles.
 - B. Other Excuses.
 1. Payment or Tender of Freight Charges.
 - a. In General.
 - b. Freight from Connecting Lines.
 - c. Actual Tender Not Necessary.
 - d. Customs.
 - e. Goods as Security for Freight.
 - f. Right to Discriminate.
 - g. Prepayment Waived.
 2. Place of Receiving.
 - a. Intermediate Points.
 - b. Beyond Terminus.
 - c. Receiving Coal.
 - d. "Regular Station," Statutory Duty.
 3. Need Not Delay Train.
 4. Live Stock Not Properly Loaded.
 5. Not Properly Packed.
 6. Tendered by Connecting Line on Sunday.
 7. Having Only Running Privileges over Track of Another Company.
 8. Doing Business with Rival Company.
 9. Unusual Press of Business.
 10. Storms.
 - a. In General.
 - b. Knowledge of Distant Snow Storm on Connecting Line.
 - c. Authority of Agent to Contract for Shipment of Live Stock during Very Cold Weather.
 11. Floods.
 12. Washouts.
 13. Military Control.
 14. Strikes and Boycotts.
 15. Duty to Notify Shipper of Existence of Obstructions to Traffic.
 - a. In General.
 - b. Receiving Perishable Freight with Knowledge of Probable Delay on Connecting Line.
 - c. Knowledge of Blockade by Snow.
 16. Unconstitutional Law.
- III. Performance of Duty Enforced by Injunction.
 - A. In General.
 1. Combination to Give Express Company Monopoly.
 2. Interference with Interstate Commerce.
 3. Apprehension of Interruption to Traffic Not Sufficient Ground.
- IV. Whether Duty May Be Enforced by Mandamus.
 - A. In General.
 - B. Application of Rule.
 1. Discrimination.
 2. Strikes.
 - C. Failure to Offer for Transportation.

Notes

I. IN GENERAL.

A railroad company, as a common carrier, cannot refuse to receive and carry any freight offered for shipment, provided it has expressly or impliedly offered to carry such freight for the public, and there is a proper offer to pay freight charges, and there is no reasonable excuse for refusing transportation.

United States.—Hannibal, etc., R. Co. *v.* Swift, 12 Wall. (U. S.) 262; Jencks *v.* Coleman, 2 Summ. (U. S.) 221; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Pearson *v.* Duane, 4 Wall. (U. S.) 605; Saltonstall *v.* Stockton, Taney's Dec. (U. S.) 11; Southern Express Co. *v.* St. Louis, etc., R. Co., 5 Myers Fed. Dec., § 1511; Three Hundred and Eighteen and One-Half Tons of Coal, Fed. Cas. No. 14,010 (14 Blatchf. 453).

Alabama.—Mobile, etc., R. Co. *v.* Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694; South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Southwestern R. Co. *v.* Webb, 48 Ala. 585.

California.—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686; Tarbell *v.* Central Pac. R. Co., 34 Cal. 616; Wheeler *v.* San Francisco & A. R. Co., 31 Cal. 46, 89 Am. Dec. 147.

Connecticut.—Fuller *v.* Naugatuck R. Co., 21 Conn. 570.

Dakota.—Waldron *v.* Chicago, etc., R. Co., 1 Dak. 336.

Georgia.—Central Railroad & Banking Co. *v.* Logan, 77 Ga. 804, 2 S. E. 465; Falvey *v.* Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58.

Illinois.—Chicago & A. R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824, affirming (1888) 27 Ill. App. 404; Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126; Chicago & A. R. Co. *v.* Gasaway, 71 Ill. 570; Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578; Galena & C. U. R. Co. *v.* Rae, 18 Ill. (8 Peck) 488, 68 Am. Dec. 574; Galena, etc., R. Co. *v.* Yarwood, 15 Ill. 468; Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; St. Louis, etc., R. Co. *v.* Dorman, 72 Ill. 504; Toledo, P. & W. Ry. Co. *v.* Pence, 68 Ill. 524; Wabash, etc., R. Co. *v.* Black, 11 Ill. App. 465.

Indiana.—Chicago, St. L. & P. R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451; Fitzgerald *v.* Adams Express Co., 24 Ind. 447; Indianapolis, etc., R. Co. *v.* Rinard, 46 Ind. 293; Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532; Louisville, N. A. & C. R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163; Pittsburgh, C. & St. L. R. W. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

Iowa.—Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601; State *v.* Chovin, 7 Iowa 204.

Kentucky.—Louisville & N. R. Co. *v.* Queen City Coal Co., 13 Ky. Law Rep. 832; Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 29 S. W. 301, 61 Am. & Eng. R. Cas. 340; Winnegar *v.* Central Pass. R. Co., 85 Ky. 547.

Maine.—Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Maryland.—Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209.

Massachusetts.—Jordon *v.* Falls River R. Co., 5 Cush. (Mass.) 69; Thomas *v.* Boston, etc., R. Corp., 10 Met. (Mass.) 472, 43 Am. Dec. 444.

Michigan.—American Merchants' Union Express Co. *v.* Phillips, 29 Mich. 515; Lake Shore & M. S. R. Co. *v.* Perkins, 25 Mich. 329, 5 Am. Ry. Rep. 249; Michigan S. & N. R. R. Co. *v.* McDonough, 21 Mich. 165.

Mississippi.—Southern Express Co. *v.* Moon, 39 Miss. 822; Vicksburg L. & T. Co. *v.* United States Exp. Co., 68 Miss. 149, 8 So. Rep. 332.

Missouri.—Birney *v.* Wabash, St. L. & P. R. Co., 3 West. Rep. 203, 20 Mo. App. 470; Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

New Hampshire.—Bennett *v.* Dutton, 10 N. H. 481.

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New Jersey.—Atwater *v.* Delaware, L. & W. R. Co., 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803; Mershon *v.* Hobensack, 22 N. J. L. 372; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; New York, etc., R. Co. *v.* Ball, 53 N. J. L. 283; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

New York.—Atlantic Mut. Ins. Co. *v.* McLoon, 48 Barb. (N. Y.) 27; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679; Camden, etc., R., etc., Co. *v.* Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Fish *v.* Clark, 2 Lans. (N. Y.) 176; Grund *v.* Pendergrast, 58 Barb. (N. Y.) 216; Hastings *v.* New York, O. & W. Ry. Co., 53 Hun 638, 6 N. Y. Supp. 836; Lamb *v.* Camden & A. R. & T. Co., 2 Daly (N. Y.) 454; People *v.* Babcock, 16 Hun (N. Y.) 313; People *v.* New York C. & H. R. R. Co., 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345; People ex rel. *v.* New York, L. E. & W. R. Co., 22 Hun (N. Y.) 533; Tierny *v.* New York C. & H. R. R. Co., 76 N. Y. 305, affirming 10 Hun 569, 67 Barb. 538.

North Carolina.—Harrell *v.* Owens, 1 Dev. & B. L. (N. Car.) 273; — *v.* Jackson, 1 Hayw. (N. Car.) 14.

Ohio.—Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457; Welsh *v.* Pittsburg, Ft. Wayne & C. R. R. Co., 10 Ohio St. 65.

Oregon.—Honeyman *v.* Oregon & California R. Co., 13 Ore. 352, 25 Am. & Eng. R. Cas. 380, 10 Pac. 628, 57 Am. Rep. 20; Thompson-Houston Electric Co. *v.* Simon, 20 Ore. 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51.

Pennsylvania.—Eagle *v.* White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

South Carolina.—Avinger *v.* South Carolina Ry. Co., 29 S. Car. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519, 7 S. E. 493; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194.

Tennessee.—East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272.

Texas.—Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211; Houston & T. C. Ry. Co. *v.* Smith, 63 Tex. 322; Texas Pac. R. Co. *v.* Nicholson, 61 Tex. 491.

Vermont.—Jones *v.* Western Vermont R. Co., 27 Vt. 399, 65 Am. Dec. 206; Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Noyes *v.* Rutland, etc., R. Co., 27 Vt. 110; Wilder *v.* St. Johnsbury & L. C. R. Co., 66 Vt. 636, 30 Atl. 41.

Virginia.—Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. Rep. 935.

Wisconsin.—Ayres *v.* Chicago & N. W. R. Co., 71 Wis. 372; Doty *v.* Strong, 1 Pin. (Wis.) 313, 40 Am. Dec. 773; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797; Leonard *v.* Whitcomb (Wis.), 7 Am. & Eng. R. Cas., N. S., 520.

England.—Austin *v.* Great Western R. Co., L. R. 2 Q. B. 442; Bretherton *v.* Wood, 3 Brod. & B. 54, 7 E. C. L. 345; Crouch *v.* Great Northern R. Co., 11 Exch. 742, 34 Eng. L. & Eq. 573; Crouch *v.* London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 23 L. J. C. P. 73; Dickson *v.* Gt. Northern Ry. Co., 18 Q. B. Div. 176; Garton *v.* Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112, 7 Jur., N. S., 1234, 9 W. R. 734; Jackson *v.* Rogers, 2 Show. 327; Johnson *v.* Midland R. Co., 4 Ex. 367, 6 Railw. Cas. 61, 1 Ry. & C. Y. Cas. 16; Lane *v.* Cotton, 12 Mod. 472; Morton *v.* Tibbett, 15 Q. B. 428, 69 E. C. L. 428; Oxlade *v.* Northeastern R. Co., 9 W. R. 272, 3 L. T. 671; Oxlade *v.* Northeastern R. Co., 15 C. B. N. S. 680, 109 E. C. L. 680; Palmer *v.* Grand Junction R. Co., 4 M. & W. 749; Pegler *v.* Monmouthshire R., etc., Co., 6 H. & N. 644, 39 L. J. Exch. 249; Richards *v.* London, etc., R. Co., 7 C. B. 839, 62 E. C. L. 839, 18 L. J. C. P. 251; Thomas *v.* North Staffordshire R. Co., 3 Ry. & C. T. Cas. 1; Williams *v.* Great Western R. Co., 52 L. T. 250, 49 J. P. 439.

Canada.—Greene *v.* St. John, etc., R. Co., 22 New Bruns. 252.

A railroad must carry any kind of property which it is adapted to

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carry and which it has impliedly or expressly offered to carry for the public. *Herring v. Utley*, 53 N. Car. 270.

It is the duty of a railroad company subject to such reasonable rules as may be adopted in the transaction of its business as a common carrier, to receive and transport goods offered for shipment to the terminus of its line. *Fremont, etc., R. Co. v. Waters* (Neb. 1897), 70 N. W. 225.

A. SPECIAL CONTRACT NOT REQUIRED.

Common carriers are bound to receive and carry for any person who tenders freight at the proper place and in the proper condition, the law implying the contract. Hence it is not necessary to prove a special contract in order to charge the carrier. *Doty v. Strong*, 1 Pinn. (Wis.) 313.

The duty of common carriers with respect to the transportation of persons or property is a duty independent of contract, arising by implication of law from the fact that persons or property are received in the course of business of such employment. *Johnson v. East. Tenn. V. & G. R. Co.*, 90 Ga. 810, 17 S. E. 121; *Delaware, L. & W. R. Co. v. Trautwein*, 41 Am. & Eng. R. Cas. 187, 52 N. J. L. 169, 7 L. R. A. 435, 13 N. J. L. 72, 19 Atl. 178; *Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

Public carriers are bound to carry articles within their scope of business, without any other contract than such as the law would imply. *Adams Express Co. v. Nock*, supra.

A railway company is bound to accept goods for carriage to a place beyond the confines of England if it holds itself out as a carrier to such place, and is subject to the common-law liability of a carrier for hire. *Crouch v. London & N. W. R. Co.*, 14 C. B. 255, 7 Railw. Cas. 717, 2 C. L. R. 188, 18 Jur. 148, 23 L. J. C. P. 73.

B. COMMON LAW.

In *Alsop v. Southern Express Co.* (N. Car.), 6 L. R. A. 271, the court said: "The study of the several statutes relating to the receipt and shipment of goods by corporations will shed further light upon the legislative intent in enacting section 1964 of the Code. By the Act of 1871-72, chap. 138, § 85 (Code, § 1963), it was prescribed that railroad companies should furnish sufficient accommodation for such freight and passengers as should, 'within a reasonable time previous thereto, be offered for transportation,' and should be liable in damages to the party aggrieved for neglect or refusal to provide such means of transportation. Subsequently the legislature seems to have realized that the requirement to furnish accommodation within a reasonable time was but a reaffirmance of the common law (leaving the courts to say what time was reasonable), and passed the Act of 1874-75 (Code, § 1967), fixing the limit of delay in shipment at five days after delivery by the consignor."

C. TEST AS TO WHETHER PARTY A COMMON CARRIER.

The true test as to whether a party is a common carrier or not is his legal duty and obligation with reference to transportation. If it is optional with him whether he will carry or not, he is a private carrier; if he must carry for all, he is a common carrier. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 S. Car. 353; *Schloss v. Wood*, 11 Colo. 291; *Nugent v. Smith*, 1 C. P. Div. 27; *Pennewille v. Cullen*, 5 Har. 238; *Mershan v. Hobensack*, 22 N. J. L. 372; *Herring v. Utley*, 53 N. Car. 270; *Spears v. Lake & M. S. R. Co.*, 67 Barb. 513; *Harlan v. Adams Exp. Co.*, 19 N. Y. Super. Ct. 235; *Russell v. Livingston*, 19 Barb. 343; *Elkins v. Boston & M. R. Co.*, 23 N. H. 275; *Fuller v. Bradley*, 25 Pa. St. 120.

In *Doty v. Strong*, 1 Pinn. (Wis.) 313, it is said in the opinion: "The first instruction asked is: 'If the jury believe that there is not proof of a contract between the plaintiff and defendants to carry the goods in question, other than the general advertisement to the public, then the plaintiff cannot recover.' In deciding this question, we must consider the nature and extent of the undertaking of the defend-

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ants as applicable to the instruction asked. The definition of 'common carriers' given, affords an easy solution of the question. 'A common carrier is one who undertakes for hire or reward, to transport the goods of such as choose to employ him, from place to place.' This is a general undertaking, and embraces every one in the community, and to make it particular, as an undertaking with a single individual, it is only necessary that he should apply, with such goods as the common carrier has undertaken to transport, in condition to be transported, at the place designated, to have the goods carried on the terms proposed in the undertaking; then the contract becomes identical with the person thus applying, and it requires no other special contract between the parties, to subject the common carrier to all legal liabilities as such, to the person applying."

D. RULES PURPORTING TO LIMIT DUTY.

A carrier cannot relieve itself from its duty to receive and carry by unreasonable regulations. Three Hundred and Eighteen and One-Half Tons of Coal, 14 Blatchf. (U. S.) 453; Krouse & Co. v. Tennessee & O. R. T. Co. (Ky.), 49 L. R. A. 270; Alsop v. Southern Exp. Co., 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297; Garton v. Bristol, etc., R. Co., B. & S. 112, 101 E. C. L. 112, 7 Jur., N. S., 234, 30 L. J. Q. B. 273; Missouri Pac. Co. v. Fagan (Tex.), 2 L. R. A. 75; Southern Exp. Co. v. Moon, 39 Miss. 822.

1. Shipper Cannot Be Required to Waive His Rights.

A common carrier has no right to refuse to receive and transport goods because the shipper will not assent to a special contract of shipment which limits his common-law responsibility. Southern Exp. Co. v. Moon, 39 Miss. 822; Garton v. Bristol & E. R. Co., 1 B. & S. 112, 7 Jur., N. S., 1234, 30 L. J. Q. B. 273, 9 W. R. 734.

A shipper cannot be required to waive any of his right as a condition precedent to the carrier's acceptance of the freight for transportation. Missouri Pac. Co. v. Fagan (Tex.), 2 L. R. A. 75.

2. Time of Receiving.

In the absence of any statute, the court cannot hold a regulation requiring the shipper of money to retain it over night at his own risk to be reasonable, where it is made the duty of express companies to provide safe places for valuables received. Alsop v. Southern Exp. Co., 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. 297. In this case it appeared that money was tendered to the agent of an express company at a regular station for shipment fifty-five minutes before the train would pass, going in the direction that the money was to be sent; but it was refused under a rule of the company that money should be received for shipment only in the morning before the train would pass in the afternoon: *held*, that the rule was in violation of the N. Car. Code, § 1964, requiring all transportation companies to receive goods of the kind and nature usually transported by them, whenever tendered.

3. Requiring Shipper to Employ Certain Hands to Load.

A regulation of a railroad company that owns a dock, that it will not receive coal from vessels landing at the dock unless the owners will employ persons in moving it designated by the company, and at wages fixed by it, which are at the ordinary price, is unreasonable, and will not be enforced. Three Hundred and Eighteen and One-Half Tons of Coal, 14 Blatchf. (U. S.) 453.

4. Agreement between Carriers Not to Accept Freight Destined to Certain Points.

The fact that competing carriers have made an agreement that neither will accept freight not destined to certain points within specified limits will not excuse one of them for refusal to receive freight destined for points within the other's territory as set apart in such contract. Seasongood, Stix, Krouse & Co. v. Tennessee & O. R. T. Co. (Ky.), 49 L. R. A. 270.

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50 Am. Rep. 605; *Green v. St. John, etc., R. Co.*, 22 New Bruns. 252; *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 607, 16 Am. & Eng. R. Cas. 57; *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100.

In *Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, the court said: "The question presented is one of first impression in this court. Nor have counsel cited any case where the exact question involved has been considered by any court of last resort. It leaves this court free to determine the law on principle, as shall be thought to best subserve public interests as well as the private interests of corporations concerned. No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage, it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line, and reshipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads."

It is one of the duties of a railroad company as a common carrier, to receive, and transport over its line of road, cars of other companies, if the gauge of the road is suitable, and the cars are not defective or out of repair, or of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or handle. *Chicago, etc., R. Co. v. Curtis* (Neb. 1897), 71 N. W. 42.

Railroad companies are obliged to receive for transportation cars of the proper gauge which are offered to them by other companies, notwithstanding difference in coupling apparatus. Not only do the necessities of commerce and their own interest require this, but it is required by statute; and it would be a flagrant breach of corporate duty to refuse. *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101.

a. Duty of Receivers.

The receiver of a railroad company who controls its operation is no less a common carrier because the property of the road is in the custody of the court, and as such carrier he is obliged to receive and transport cars and freight, and to furnish accommodations to connecting lines, to the same extent and in the same manner as are the proper officers of other railroad companies. *Beers v. Wabash, St. Louis & Pacific R. Co. (C. C.)*, 35 Am. & Eng. R. Cas. 646, 34 Fed. 244.

b. Defective Cars.

But a railroad company is not bound to receive and haul the car of another road so defectively constructed or otherwise unsafe as manifestly to imperil the life and limb of its employees. *Texas and Pacific Ry. Co. v. Carlton*, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

c. Connecting Carrier May Transfer Live Stock to Its Own Cars.

And, in the absence of express contract or special circumstances making it the duty of a connecting carrier to continue the transportation of cattle in the same cars in which they are delivered to him, he has the right to unload for the purpose of transferring them to his own cars, provided this is done without unnecessary delay. *M'Alister v. Chicago, etc., R. R. Co.*, 74 Mo. 351, 7 Am. & Eng. R. Cas. 373.

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A provision in the charter of a railroad company requiring its company to permit other companies to form "running connections" with it, does not impose any obligation upon such company to carry freight in the cars in which it may be tendered by a connecting line when its own cars are not in use, and the freight would not be injured by transfer to another car. *Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co.*, 51 Fed. 465, 51 Am. & Eng. R. Cas. 145.

3. Coal.

If a railway company does not hold itself out as a common carrier of coal, it is not obliged to carry coal from station to station, or for coal merchants, and may restrict its coal traffic to the carriage of coal for colliery owners, from the pit's mouth to stations where such colliery owners have their depots. *Oxlade v. Northeastern R. Co.*, 15 C. B. N. S. 680.

The fact that a railway company posts up in a particular station a list of tolls, including those for coal, is not sufficient evidence that it holds itself out as a common carrier of coal from that station. *Oxlade v. Northeastern R. Co.*, *supra*.

But a railroad company accustomed as a common carrier to hauling coal over its road and to furnish cars for that purpose cannot refuse to receive coal for transportation without rendering itself liable for resulting damages. *Louisville & N. R. Co. v. Queen City Coal Co.* (Ky.), 13 Ky. Law Rep. 832.

4. Freight from Connecting Lines.

It is the statutory duty of the carrier to receive freight from a connecting line for shipment whenever tendered, unless it has a legal excuse for not doing so. *Beers v. Wabash, etc., R. Co.*, 34 Fed. 244, 35 Am. & Eng. R. Cas. 646; *Chicago, etc., R. Co. v. Burlington, etc., R. Co.*, 34 Fed. 481, 35 Am. & Eng. R. Cas. 650; *Coe v. Louisville, etc., R. Co.*, 3 Fed. 775; *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 53 Am. & Eng. R. Cas. 307 (subject treated at length in opinion of Taft, J.).

5. Live Stock.

Railroad companies are not by the common law carriers of live stock, and can only make themselves carriers of that species of property by assuming to convey it as carriers, either expressly or by implication. *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400; *Lawrence v. Milwaukee, etc., R. Co.*, 84 Wis. 427; *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Wabash, etc., R. Co. v. Black*, 11 Ill. App. 465; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Texas Pac. R. Co. v. Nicholas*, 61 Tex. 491; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504; *Newport News, etc., R. Co. v. Mercer*, 96 Ky. 475, 61 Am. & Eng. R. Cas. 340; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

"In some of the states—notably Michigan—the carriers of live stock are not regarded as common carriers unless they have expressly assumed the responsibilities of common carriers by special contract. *Michigan Southern & N. I. R. Co. v. McDonough*, 21 Mich. 165; *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329. 'But in most of the states,' says Mr. Lawson, 'the carriers of living animals are held to be common carriers, and to be insurers to the same extent as if engaged in carrying general merchandise, subject to explanation as to loss or damage caused by animals to themselves and to each other.' *Laws Cont.* 17, and note of authorities. There is no doubt that there is some controversy in the judicial mind whether, in the conveyance of live stock, the duties and liabilities of the common law attach to the carrier, or whether the carrier, in the absence of a special contract, is to be regarded as the bailee or special agent for the transportation of such property, bound only to furnish suitable and safe carriage and motive power, and liable only for defects in these. For the authorities upon this subject, see *Whart. Neg.* §§ 615 to 621."

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Lord, J., in delivering the opinion in *Honeyman v. Oregon and California R. Co.* (Ore.), 25 Am. & Eng. R. Cas. 380.

A railroad charter only binds the company as a common carrier to transport such property as was usually transported by railroad companies at the time the charter was granted; and where cattle were not transported by rail at the time a charter was granted, the company is not bound to transport them as a common carrier, unless it holds itself out to the public as transporting them, or enters into a special contract to do so. *Michigan, S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.

Evidence that a company had carried, and still offers to carry, live stock for hire for all who desired on terms, as to duties, liabilities, and relations, not recognized by the law of carriers, but in some respects variant, and in others repugnant thereto, does not tend to prove that such company is a carrier of live stock. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 5 Am. Ry. Rep. 249.

But in the case of *Kimball v. The Rutland & Burlington R. R. Co.*, 26 Vt. 247, 254 et seq., the court decided that "a railway company that transports cattle and live stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment." See also, *Welsh v. Pittsburg, Ft. Wayne & C. R. R. Co.*, 10 Ohio St. 65.

The complainants, a stock-yard company, sought an injunction to compel a railroad company to receive at their yards from complainants live stock carried over the road and consigned for delivery at the defendants' yards. The injunction was denied, first, because the question whether defendants were subject to any duty to the complainants to receive such freight is an unsettled question of law; second, because the injunction asked for was mandatory, and such writs are not ordinarily granted until final hearing. *Delaware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 31 Am. & Eng. R. Cas. 82, 43 N. J. Eq. 71, 9 Cent. Rep. 111, 10 Atl. 490, affirmed in 43 N. J. Eq. 605, 12 Atl. 374.

J. ROUTE AND MODE OF SHIPMENT.

In the absence of an express provision in the shipping contract, the carrier may select the route and mode of shipment, provided the mode or route selected is such that delivery can be made in a reasonable time. *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422; *Frank v. Memphis, etc., R. Co.*, 52 Miss. 570; *Southern Kansas R. Co. v. Duncan*, 40 Kan. 503; *Hostetter v. Baltimore, etc., R. Co.* (Pa.), 32 Am. & Eng. R. Cas. 549; *Dixon v. Columbus, etc., R. Co.*, 4 Biss. (U. S.) 137; *Hales v. London, etc., R. Co.*, 4 B. & S. 66, 116 E. C. L. 66, 11 W. R. 856.

Where goods are ordered and no specific instructions given as to the shipment, a delivery to the usual carrier is a constructive delivery to the purchaser, and the goods become his at once, subject only to the right of stoppage in transitu; but a mere direction on the part of the purchaser that he wants the goods sooner than they would reach him by river is not sufficient to justify a shipment by express, in the absence of anything to show that it was the usual carrier, or a carrier at all, except as its name might indicate. *Comstock v. Affaelter*, 50 Mo. 411.

Where the established route of a carrier was by rail to Philadelphia and by water to Boston, he was not bound to send goods by rail from Philadelphia when there was an obstruction in the water communication. *Empire Transp. Co. v. Wallace*, 68 Pa. St. 302, 1 Am. Ry. Rep. 443.

Where a contract gives the carrier an option between modes of transportation, the option must be exercised with a view to the owner's interest. *Blitz v. Union Steamboat Co.*, 51 Mich. 558, 17 N. W. 55.

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Where an article is delivered to a common carrier for transportation, he must exercise his own judgment as to the mode of carrying it, and he cannot escape liability for damage caused by the mode of transportation on the ground of misrepresentations as to the nature of the freight, unless they relate to matters latent in their character. *New Jersey R. & T. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100.

In *Hales v. London & N. W. R. Co.*, 4 B. & S. 66, 32 L. J. Q. B. 392, 11 W. R. 856, 8 L. T. 421, it was held that in the absence of an express contract a carrier must carry goods according to the usual route.

K. DISCRIMINATION.

1. General Rule.

Under this rule, a carrier cannot discriminate by receiving and carrying for one customer and, under substantially the same circumstances, refusing to carry for another.

United States.—*Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co.*, 67 Fed. 35, 31 U. S. App. 252.

California.—*Wheeler v. San Francisco, etc., R. Co.*, 31 Cal. 46, 89 Am. Dec. 147.

Colorado.—*Bayles v. Kansas Pac. R. Co.*, 13 Colo. 181, 40 Am. & Eng. R. Cas. 42; *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348, 61 Am. & Eng. R. Cas. 128.

Illinois.—*Chicago, etc., R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Great Western R. Co. v. Burns*, 60 Ill. 284, 12 Am. Ry. Rep. 309.

Indiana.—*Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593.

Maine.—*New England Exp. Co. v. Maine Cent. R. Co.*, 57 Me. 188, 2 Am. Rep. 31.

Massachusetts.—*Boston & Albany R. v. Shanley*, 107 Mass. 568, 12 Am. Law Reg., N. S., 500; *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 14 Allen (Mass.) 462.

New Hampshire.—*Bennet v. Dutton*, 10 N. H. 486; *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430, 13 Am. Rep. 72, 2 Am. Ry. Rep. 241.

New Jersey.—*Mallory v. Tioga R. Co.*, 39 Barb. (N. J.) 488; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754; *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100.

New York.—*Acheson v. New York, Cent., etc., R. Co.*, 61 N. Y. 62; *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712; *Keeney v. Grand Trunk R. Co.*, 59 Barb. (N. Y.) 104, affirmed in 47 N. Y. 525.

Pennsylvania.—*Cumberland Valley R. Co.'s Appeal*, 62 Pa. 218; *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 607.

Texas.—*Houston, etc., R. Co. v. Smith*, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

Wisconsin.—*Doty v. Strong*, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773.

England.—*Baxendale v. Bristol, etc., R. Co.*, 11 C. B. N. S. 787, 13 E. C. L. 787; *Cooper v. London, etc., R. Co.*, 4 C. B. N. S. 738, 5 E. C. L. 738; *Crouch v. Great Northern R. Co.*, 11 Exch. 742; *Crouch v. London & N. W. R. Co.*, 23 L. J. C. P. 73; *Davis v. Taff Vale R. Co.* (1895), App. 542, 11 R. 189; *Garton v. Bristol & E. R. Co.*, 30 L. J. Q. B. 273; *Palmer v. London, etc., R. Co.*, L. R. 6 C. P. 194, 40 L. J. C. P. 133; *Johnson v. Midland R. Co.*, 4 Exch. 327; *Lees v. Lancashire, etc., R. Co.*, 18 Sol. Jour. 629; *Page v. Great Northern R. Co.*, 2 Ir. Rep. (C. L.) 288; *Palmer v. London, etc., R. Co.*, L. R. 1 C. P. 588, 35 L. J. C. P. 289; *West v. London, etc., R. Co.*, L. R. 5 C. P. 622; *Southeastern R. Co. v. Railway Com'rs*, 41 L. T. N. S. 760, 28 W. B. 464.

A railroad is a common carrier, and, as such, is bound to carry for all persons all goods offered for transportation by any person whatever. *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 35 Am. & Eng. R. Cas. 519, 13 Am. St. Rep. 716. In this case it is said in the

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opinion: "While it is true that at common law, and in the absence of charter or statutory regulations to the contrary, a common carrier may discriminate as to rates, so that no unreasonable charge is made, yet he must carry for all; because it is a leading principle of the common law, applicable to all common carriers, that they are bound to carry for all, and for a reasonable remuneration."

A railroad company cannot lawfully carry for one person and refuse, without a sufficient excuse, to carry for another, even though it had the right to refuse to carry for the first. *Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co.*, 67 Fed. 35, 31 U. S. App. 252.

2. Time of Shipment.

Railway companies must take and transport property in the order in which it is offered, and they cannot exercise partiality in accepting the property tendered by some and rejecting that offered by other persons. If this rule is violated the company is liable for all damages resulting therefrom. *Houston & T. C. R. Co. v. Smith*, 22 Am. & Eng. R. Cas. 421, 63 Tex. 322; *St. Louis, A. & T. H. R. Co. v. Hill*, 14 Ill. App. 579.

If a company store freight received for transportation, on the ground that it has not facilities to forward it, and in the meantime receive and forward new and subsequent freight, it is liable to parties injured thereby. Nor is it any defence that the goods of plaintiff were shipped before other freights received sooner. *Great Western R. Co. v. Burns*, 60 Ill. 284, 12 Am. Ry. Rep. 309.

A railway company cannot close its office and refuse to receive goods for carriage, while at the same time it continues to receive similar goods from a particular individual. *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 W. R. 734.

It is undue prejudice for a railway company to receive goods at its station of one carrier later than it receives them of another, although the first carrier brings his goods properly classified, weighed, and prepared for loading. *Garton v. Bristol & E. R. Co.*, 6 C. B. N. S. 639, 5 Jur. N. S. 1313, 28 L. J. C. P. 306, 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. Q. B. 273, 9 W. R. 734.

But it is not the duty of a railroad company, as a common carrier, to ship freight in the order of time in which it was offered with reference to its entire line, but only with reference to the station where it was tendered. *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

And there is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character and condition, or its liability to perish. *Peet v. Chicago & N. W. R. Co.*, 20 Wis. 594.

So where two kinds of property are delivered to a carrier at the same time by different owners, one of which is perishable and the other not, preference is to be given in the transportation to that which is perishable. *Marshall v. New York C. R. Co.*, 45 Barb. (N. Y.) 502; *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305, 67 Barb. 538.

And the same rule of preference must be observed in forwarding accumulated freight. *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305, affirming 10 Hun 569, 67 Barb. 538.

3. Common Law.

The provision in the constitution of Colorado, that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposes no greater obligation on a railroad company than the common law would have imposed

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upon it. *Atchison, etc., R. R. Co. v. Denver, etc., R. R. Co.*, 110 U. S. 607, 16 Am. & Eng. R. Cas. 57.

4. Exclusive Right to Ship.

A contract between a railroad company operating a railroad in New Jersey, under acts of the legislature of that state, and certain individuals, the effect of which is to give the latter the exclusive right of transporting certain kinds of freight over their railroad, is void from considerations of public policy, and will not be enforced by the courts of New Jersey, notwithstanding it has been recognized as valid by the courts of another state. *Union L. & E. Co. v. Erie R. Co.*, 37 N. J. L. 23; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531.

5. Agreement to Transport Coal for Collieries Exclusively.

A railway company, in order to prevent the obstruction of its railway, which would be caused by an unlimited coal traffic, ascertained the probable consumption of coal in the neighborhood of each of its stations, and made arrangements with the collieries for the requisite supply; it appointed depot agents to manage the sale of the coal, who from time to time ordered the quantity wanted. All the depots were in hands of these agents, who accounted to the collieries for the proceeds of the sale. No coal merchant was dealt with in this way, but only coal owners, and each dealer was treated alike and as one of the public. On a motion by a coal merchant to enjoin the company to afford him the same facilities for receiving and forwarding his coal as to those who consigned their coal to the company, *held*, that the arrangements of the company were not such as gave or caused any unreasonable preference or disadvantage. *Oxlade v. North Eastern R. Co.*, 1 C. B. N. S. 454, 3 Jur., N. S., 637, 26 L. J. C. P. 129.

6. Cannot Discriminate in Favor of Connecting Line.

Railroad companies have a right to unite in continuous lines for greater facilities in the transportation of goods and passengers, but any agreement that a railroad company shall at a certain terminus refuse or discriminate against freight which comes to it over other than its connecting line is void, as against public policy. *Denver, etc., R. Co. v. Atchison, etc., R. Co.*, 110 U. S. 607, 16 Am. & Eng. R. Cas. 57.

7. Receiving Freight on Side Tracks at Private Warehouse.

It is the duty of a company to receive freights of all persons according to its usage and custom, and where wheat is tendered for shipment, and the company is in the habit of receiving such freight by running its cars on side tracks to private warehouses, a tender accordingly, or notice and readiness to deliver the wheat in that manner, is sufficient, and the company cannot require that the grain be delivered in a different manner or at a different place. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

8. Relief Goods for Chicago Fire Sufferers.

But giving preference to relief goods sent to the sufferers by the great Chicago fire was not such a discrimination against shippers of other freight as to make carriers liable as for negligence for not forwarding freight in the order in which it was received. All general rules must yield to a great public necessity. *Michigan C. R. Co. v. Burrows*, 33 Mich. 6.

II. EXCUSES FOR REFUSAL TO RECEIVE AND CARRY FREIGHT.

A. CHARACTER OF GOODS.

1. In General.

This duty does not compel carriers to accept and carry all goods that may be offered, but only such as they have undertaken to carry, either expressly, or by implication. *Nitroglycerine Cases*, 15 Wall. (U. S.) 524; *Kuter v. Michigan C. R. Co.*, 1 Biss. U. S. 35; *Chicago, M. & St. P. R. Co. v. Wallace* (C. C. A.), 66 Fed. 506; *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578; *Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 109 Ill. 135,

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18 Am. & Eng. R. Cas. 506; *Chicago & A. R. Co. v. Gasway*, 71 Ill. 570; *Fitzgerald v. Adams Express Co.*, 24 Ind. 447; *Lee v. Bargess*, 9 Bard. (Ky.) 652; *Boston & Albany R. v. Shanley*, 107 Mass. 568, 12 Am. L. Reg., N. S., 500; *Jordon v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 5 Am. Ry. Rep. 249; *Vicksburg L. & T. Co. v. United States Exp. Co.*, 68 Miss. 149, 8 So. 332; *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305; *Allen v. Sewall*, 6 Wend. (N. Y.) 335; *People ex rel. v. Babcock*, 16 Hun (N. Y.) 313; *Honeyman v. Oregon & California R. Co.*, 13 Ore. 352, 25 Am. & Eng. R. Cas. 380, 10 Pac. 628, 57 Am. Rep. 20; *Dickson v. Northern Ry. Co.*, 18 Q. B. Div. 176; *Thomas v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 1; *Johnson v. Midland R. Co.* (Eng.), 4 Ex. 367, 6 Railw. Cas. 61, 1 Ry. & C. T. Cas. 16; *Herne v. Garton*, 2 El. & El. 66, 28 L. J. M. C. 16.

One who has never assumed or offered to carry chattels of a certain class, except upon special terms exempting him from all the important duties and liabilities of a carrier, cannot be classed among carriers of property of that kind, or be made amenable in the character of a common carrier as to such property. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 5 Am. Ry. Rep. 249.

In *Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, the court said: "The law, as has been seen, makes all railways in this state 'public highways,' open to the use of all persons for the transportation of their persons or property, under such regulations as may be prescribed by law, and it is apprehended it is unlawful to make any discrimination as to the property offered to be carried, or as to whether it belongs to a private person or to a corporation. If it is such property as is capable of being carried with the means ordinarily employed by such carriers, the obligation is imperative, and the carrier must receive the property and carry it with safety, in the way such property is usually carried."

In *Chicago, M. & St. P. R. Co. v. Wallace*, 66 Fed. 511, it is said in the opinion: "In *Hutchinson on Carriers* (2d Ed., § 44) it is stated: 'A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and, where this is the effect of a special arrangement, a carrier is not liable as a common carrier, and cannot be proceeded against as such.'

" 'In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is therefore not liable as such, where, by special agreement, as a matter of accommodation, merely, he undertakes to carry a class of goods which it is not his business to carry.' "

a. Statutes.

Cal. Civ. Code, § 2169, does not compel carriers to accept and carry all goods that may be offered, but only such as it has undertaken and is accustomed to carry. *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404.

Notwithstanding the New York General Railroad Act of 1850, ch. 140, § 36, requiring railroad companies to furnish accommodations for all property offered for shipment, a company should refuse to receive perishable freight if it has not the means of immediate transportation. *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305, affirming 10 Hun 569, 67 Barb. 538.

A railway company is under the same obligations as a common carrier undertaking to carry in accordance with the provisions of the Railway and Canal Traffic Act, 1854; therefore questions as to how far a sender of goods may require delivery at any station he may appoint, or as to how far a railway company is liable to carry goods

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of every kind, or for all persons alike, are to be determined in each case, not with reference to what a railway company may choose to do, or may ordinarily do, but with reference to what may be within its powers, and at the same time a reasonable requirement. *Thomas v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 1.

The 86th section of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), is an enabling provision; and if a company act as carriers they are not bound to carry all kinds of goods from and to every station on the line, but only such goods to and from such places as they have publicly professed to do and have convenience for. *Johnson v. Midland R. Co.*, 4 Ex. 367, 6 Railw. Cas. 61, 1 Ry. & C. T. Cas. 16.

2. Circus Property and Performers.

A railroad company made a contract to haul a train consisting of cars owned by the other party, and which contained circus property and performers, on stated days, between certain points, at a rate less than the regular rates of the company. It was outside the scope of the company's regular business to haul such trains: *held*, that the company in hauling such trains acted as a private carrier merely, and the validity of the contract was not affected by the fact that it contained a stipulation against liability for damage. *Chicago, M. & St. P. R. Co. v. Wallace* (C. C. A.), 66 Fed. 506.

3. Dangerous Substances.

While the ordinary obligation of a carrier is to receive all goods offered for shipment, he may refuse to accept dangerous articles, and if there is reasonable ground to suspect their character, he may demand to examine them. Without such reasonable ground for suspicion, however, he cannot force the consignor to disclose their nature. *Nitroglycerine Cases*, 15 Wall. (U. S.) 524; *Boston & Albany R. v. Shanley*, 107 Mass. 568, 12 Am. L. Reg., N. S., 500; *Herne v. Garton*, 2 El. & El. 66, 28 L. J. M. C. 16.

A carrier may refuse to accept powder for transportation. *California Powder Works v. Atlantic & P. R. Co.*, 113 Cal. 329, 45 Pac. 691. In this case it is said in the opinion: "Nor are the exemptions contained in the contract of the shipping order void for lack of consideration. The defendant was not obliged to receive and transport the powder at all. A common carrier is not bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk; nor dangerous articles as nitroglycerine, dynamite, gunpowder, aqua fortis, oil of vitriol, matches, etc. 3 Wood, Ry. Law, § 426; Hutch. Carr. § 113; 2 Rorer R. R. § 1231; *Pfister v. Railroad Co.*, 70 Cal. 169, 11 Pac. 686; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Perkins*, 25 Mich. 329. It was thus optional with the defendant to accept the powder for transportation or not; but, if it chose to accept it, it could accept it upon such terms and with such limitation of its common-law liability as it saw fit. *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. Car. 353."

4. Dogs.

"At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms." *Lindley, J.*, in *Dickson v. Gt. Northern Ry. Co.*, 18 Q. B. Div. 176.

A common carrier who does not assume to act as such in the carriage of dogs, but, upon the request of a party, consents to carry a dog on a particular occasion, cannot be sued as a common carrier for the subsequent death of the dog while under his charge, even though money may have passed to defendant's agent for the carriage. The action must be upon a private contract, if recovery is sought. *Honeyman v. Oregon and California R. Co.*, 13 Ore. 352, 25 Am. & Eng. R. Cas. 380, 10 Pac. 628, 57 Am. Rep. 20.

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5. Glassware.

A mandamus will not issue to compel an express company to carry breakable goods, such as glassware, subject to all the common-law liabilities of a common carrier, where the uniform practice of defendant company, as well as others, has been to only carry such wares under a limited liability. *People ex rel. v. Babcock*, 16 Hun (N. Y.) 313.

6. Intoxicating Liquor.

An express company accustomed to receive jugs of liquor in an unboxed condition, under a special arrangement voluntarily made by it with shippers, may, at will, withdraw from the arrangement without liability to shippers who have been availing of it, though they incur increased expense by reason of the change. *Vicksburg L. & T. Co. v. United States Exp. Co.*, 68 Miss. 149, 8 So. 332.

7. Live Pigeons.

Whether or not live pigeons would be regarded in any case as common-law freight for an express company conducting as common carriers, quære. *American Merchants' Union Express Co. v. Phillips*, 29 Mich. 515.

8. Money and Bank Bills.

Where one is sought to be held liable as a common carrier of money and bank bills, it must be shown that he is such, if that class of carrying is not within the ordinary business in which he is engaged. *Lee v. Burgess*, 9 Bush (Ky.) 652; *Allen v. Sewall*, 6 Wend. (N. Y.) 335; *Jordon v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *Kuter v. Michigan C. R. Co.*, 1 Biss. (U. S.) 35; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578.

It is not the business of railway companies to carry money. *Jordon v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

A charter of a railroad company, granted at a time when it was not incumbent on common carriers to carry money, and requiring it to transport "all merchandise and property," does not make it a common carrier of money; nor does transporting money for an express company under a special contract have that effect. *Kuter v. Michigan C. R. Co.*, 1 Biss. (U. S.) 35.

Money and bank bills may for certain purposes be regarded as goods, but ordinarily, in speaking of "goods, wares, and merchandise," neither is included, and a common carrier of "goods, wares, and merchandise" will not necessarily be presumed to be a common carrier of money and bank bills. *Lee v. Burgess*, 9 Bush (Ky.) 652.

Where there is no proof that a railroad company has at any time carried bank bills or money of any kind, or held themselves out to the public as carriers of such property, and no express contract to carry money has been proved, such contract cannot be implied from the fact that the company held itself out as a carrier of "goods, freight, and passengers"; and it not being the business of the company to take bank bills as freight, before it can be liable for such there must be proof that its agent was authorized to receive them; and proof that the agent was authorized to receive "goods and freight" is not enough to show an implied power to receive bank bills at ordinary freight rates. *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578.

A common carrier is not bound to receive money for transportation, unless it is properly secured and addressed; nor will his refusal to count the money at the request of the consignor, create any presumption against him as to the amount contained in the package. *Fitzgerald v. Adams Express Co.*, 24 Ind. 447.

The plaintiff, a county treasurer, was a passenger on a train on defendant's road, for the purpose of going from San Jose to Sacramento. He had with him, in small leather satchels, \$91,952, in gold coin, due the state from the plaintiff as county treasurer, and which he was taking to deliver to the state treasurer. No objection was made by the conductor of the train, who had knowledge of the con-

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tents of the satchels, until they reached Niles, a way station on the road. Here it was necessary to change cars, and the conductor from Niles refused to permit the plaintiff and his employees to enter the train with their treasure, and required him to deliver the same to the Wells, Fargo Express Co., to whom the defendant had given the exclusive privilege of carrying money on its trains. The plaintiff at first refused to do this, and offered to go into the baggage car and pay any charges which might be exacted for the transportation of the money. This offer was refused, and, to avoid being left at Niles, the plaintiff delivered the money to the express company, paying for the transportation \$68.95. In an action against the company for refusing to carry the treasure, it was *held*, that the duty of the carrier is confined, both by the common law and the Code of California, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry," and there could be no recovery. *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404, 27 Am. & Eng. R. Cas. 246.

In this case it is said in the opinion: "A common carrier of goods is not under obligation to accept any and carry all personal property that may be offered. That class of carriers known as 'transfer companies,' engaged in receiving and transferring the baggage of passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property 'of a kind that he undertakes or is accustomed to carry.'"

In *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 69, it was held, that the presumption is that the captain of a vessel employed by a common carrier to transport goods for hire has authority to carry bank bills, if it is within the charter powers of the carrier to carry such articles.

9. Perishable Goods.

Notwithstanding the New York General Railroad Act of 1850, ch. 140, sec. 36, requiring railroad companies to furnish accommodations for all property offered for shipment, a company should refuse to receive perishable freight if it has not the means of immediate transportation. *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305, affirming 10 Hun 569, 67 Barb. 538.

10. Prohibited Articles.

A railroad is not bound, as a common carrier, to receive for transportation that which the law prohibits it from carrying. *Chicago & A. R. Co. v. Gasaway*, 71 Ill. 570.

A railway company commits no breach of duty in refusing to carry cattle without a declaration from the owner or person in charge under the Contagious Diseases (Animals) Act, 1878, where a local authority of the county makes a regulation requiring such declaration before bringing cattle into the county. *Williams v. Great Western R. Co.*, 52 L. T. 250, 49 J. P. 439.

An express company is not bound to transport and deliver intoxicating liquor, if thereby it would incur a penalty. *State v. Goss*, 30 Am. & Eng. R. Cas. 118, 59 Vt. 266, 9 Atl. Rep. 829, 4 N. Eng. Rep. 518.

B. OTHER EXCUSES.

1. Payment or Tender of Freight Charges.

a. In General.

A carrier may require a prepayment of his charges and may refuse to carry goods tendered for transportation unless such charges are paid in advance. While the law compels him, from motives of public policy, to deal with all persons, and leaves him no choice as to his

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customers, it does not bind him to deal on credit, and he may demand the price of his labor before it is performed. *Allen v. Cape Fear & Y. N. R. Co.*, 100 N. Car. 397, 35 Am. & Eng. R. Cas. 532; *Wyld v. Pickford*, 8 M. & W. 443; *Batson v. Donovan*, 4 B. & Ald. 28, 6 E. C. L. 376; *Bastard v. Bastard*, 2 Show. 81; *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Barnes v. Marshall*, 18 Q. B. 785, 83 E. C. L. 785; *Randall v. Richmond, etc., R. Co.*, 108 N. Car. 612, 49 Am. & Eng. R. Cas. 75.

In order to have a right of action against a carrier for refusing to receive and carry grain, there must have been a tender of the customary freight charges, or manifestation of readiness and willingness to pay according to the course and usage of the company, whether that was required to be paid in advance or not. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

A common carrier is not bound to receive and transport freight unless it is offered by the owner or his agent, and there is prepayment of freight charges. *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33. In this case the court said: "The obligation of a common carrier to receive and carry all goods offered, is qualified by several conditions, which he has a right to insist upon before receiving them: 1. That the person offering the goods has authority to do so. 2. That a just compensation, or the usual price, be tendered for the carriage; and 3. That although the owner, or his agent, offer goods for carriage and tender payment for the freight in advance, still he is not bound to receive them, unless he have the requisite convenience to carry them."

b. Freight from Connecting Lines.

A common carrier may require prepayment of freight charges from any shipper at its choice, although it does not require it from others, and may lawfully refuse to receive freight from a connecting carrier without such prepayment. It should appear, however, that the shipper or forwarding carrier had notice that prepayment was required. *Randall v. R. & D. R. Co.*, 108 N. Car. 612, 49 Am. & Eng. R. Cas. 74; *Central, etc., R. Co. v. Morris*, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50.

c. Actual Tender Not Necessary.

But in an action against a carrier for refusing to carry goods, it is not necessary to aver the actual tender of money for the carriage; an averment that the plaintiff was ready and willing to pay is sufficient. *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372, 9 D. P. C. 766, 2 Railw. Cas. 592, 5 Jur. 731.

d. Customs.

And it has been held that whether a railroad company can excuse a refusal to accept and carry freight on the ground that the charges were not prepaid, will depend upon its custom in collecting charges, which is a question for the jury. *Reed v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 176.

e. Goods as Security for Freight.

And in *Leach v. New York, etc., R. Co.*, 89 Hun (N. Y.) 377, it was held that the shipper was entitled to prove that the goods were ample security for the freight, so that there was no sufficient reason for stopping the goods in transit. In this case the defense was failure to tender freight charges.

f. Right to Discriminate.

In *Allen v. Cape Fear & Y. V. R. Co.*, 100 N. Car. 397, 35 Am. & Eng. R. Cas. 532, and in *Randall v. Richmond & Danville R. Co.*, 108 N. Car. 612, 49 Am. & Eng. R. Cas. 75, the supreme court of North Carolina takes the position that a carrier may discriminate among shippers in this regard, and require prepayment of some and allow credit to others. In the *Allen Case* it is said that this right to demand prepayment is but the exercise of a right to demand of every one, that, upon all freight conveyed, the charges must be paid in advance;

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and we do not perceive any legal wrong done to one to whom credit may not be given because it is given to others; it may be because of their punctuality in paying bills whenever they are presented. The statute recognizes the right, for it compels the company to furnish transportation, not generally, but "on the due payment of the freight or fare legally authorized therefor" (Code, § 1963); and therefore the exaction of prepayment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if the fact that it be not, enforced against all dealers.

g. Prepayment Waived.

It is the duty of express companies to receive all goods offered for transportation, upon the payment or tender of their charges, but prepayment will be considered waived if not demanded. *Alsop v. Southern Exp. Co.*, 40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. 297.

2. Place of Receiving.

A carrier is not liable for failure to furnish cars and transport goods unless they are offered at a regular depot or other usual or designated place for receiving freight. *Louisville, etc., R. Co. v. Flanagan*, 32 Am. & Eng. R. Cas. 532, 113 Ind. 488, 3 Am. St. Rep. 674.

a. Intermediate Points.

Where common carriers, doing an express business, only hold themselves out as carriers between certain designated points, they cannot be compelled to carry from intermediate points; and where they are sued for property delivered to an agent at an intermediate point, it is competent for them to show that they were not carriers from such point, and that the agent was not authorized to receive the goods. *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

b. Beyond Terminus.

A railroad company cannot be compelled to receive goods beyond its own terminus. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

c. Receiving Coal.

Although a company carries coal and other goods for hire from one end of its line to the other, and carries goods other than coal from an intermediate station, it is not bound to carry coal from that station unless it has publicly professed to do so; and even if it has held itself out as a carrier of coal from that station, no action for refusing to carry coal from it will lie, unless it is shown that the company has conveniences at the station for receiving and carrying the coal. *Johnson v. Midland R. Co.*, 6 Railw. Cas. 61, 4 Ex. 367, 18 L. J. Ex. 366.

d. "Regular Station," Statutory Duty.

A place at which there has never been any station agent, where no tickets are kept or sold, where there is no agent's office, and where no bills of lading or receipts are given, but where the conductors sometimes stopped trains and took on freight and passengers, is not a "regular depot or station" within the meaning of the provision of the North Carolina Code, which imposes a penalty upon any company refusing to receive freight at any "regular depot, station, wharf," etc. *Kellogg v. Suffolk & Carolina R. Co.*, 35 Am. & Eng. R. Cas. 529, 100 N. Car. 158.

3. Need Not Delay Train.

Where the stock to be shipped by plaintiff was not loaded upon the arrival of the defendant's train, and was not even in the yards of the company, but in a private yard, and had not been given into the possession of any authorized agent for defendant, it was held that defendant was not liable for refusing to delay the train until the stock could be loaded, notwithstanding the same train took cars of stock at other stations later, although in these instances the locomotive was required to assist in loading the cars, while in plaintiff's case it was not. *Frazier & Cooper v. The K. C., St. J. & C. B. Ry. Co.*, 48 Iowa 571.

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4. Live Stock Not Properly Loaded.

One railroad company is not bound to receive cars from a connecting road loaded with hogs so crowded that they are in danger from suffocation; and if it does it makes the act of that road its own, and is bound for the damages resulting to the hogs from suffocation or improper loading. *Paramore v. Western R. Co.*, 53 Ga. 383.

5. Not Properly Packed.

A carrier may refuse to receive for carriage an article of property which is improperly packed. *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Fitzgerald v. Adams Express Co.*, 24 Ind. 447, 87 Am. Dec. 341; *Boyd v. Moses*, 74 U. S. 192, 7 Wall. 316; *Hart v. Baxendale (Eng.)*, 16 L. T. N. S. 390, 6 Exch. 769, 16 Jur. 126.

In *Boyd v. Moses*, 74 U. S. 192, 7 Wall. 316, it was held that a carrier may refuse to receive for transportation lard so packed that it could not be carried without injury to the rest of the cargo.

6. Tendered by Connecting Line on Sunday.

The fact that stock is offered by a connecting line for transportation on Sunday does not excuse the carrier's failure to receive and carry. *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194.

7. Having Only Running Privileges over Track of Another Company.

Where a company has only running privileges over a part of the track of another company it is not required to violate its agreement as to the use of the track, and it is not a violation of the interstate commerce act to refuse to receive traffic on the track, where the sufficiency of the local service rendered by the company owning the track is not questioned. *Alford v. Chicago, R. I. & P. R. Co.*, 2 Int. Com. Rep. 771, 3 Int. Com. Rep. 519.

8. Doing Business with Rival Company.

One railroad company is not justified in disconnecting a switch leading to a coal mine, and refusing to permit the owners of the coal mine to ship coal over its road because such owners also ship coal from the same mine over the road of another railroad company which is also connected with the mine by a switch. *Chicago & Alton R. Co. v. Suffern*, 129 Ill. 274, 38 Am. & Eng. R. Cas. 508, 21 N. E. 824.

9. Unusual Press of Business.

A railroad company which has the rolling stock and equipments to carry without delay the freights usually offered, is not bound to receive goods which it is not at the time able to carry by reason of some accidental or extraordinary increase in the public demand for transportation, which occurs without the fault of the company. In such case the company may rightfully decline to receive freights offered which it cannot carry without delay; but if it does receive them it can only relieve itself from responsibility for delay resulting from a previous accumulation of freights by acquainting the shipper with the facts when he offers his goods and affording him the option of acquiescing in the delay or seeking some other line of transportation. *Bussey v. Memphis & L. R. R. Co.*, 4 McCrary (U. S.) 405, 13 Fed. 330; *Helliwell v. Grand Trunk R. Co.*, 10 Biss. (U. S.) 170, 7 Fed. 68; *Thomas v. Wabash, etc., R. Co.*, 63 Fed. 200; *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. 643, 43 Am. & Eng. R. Cas. 79; *Louisville, etc., R. Co. v. Tourat*, 97 Ala. 514, 55 Am. & Eng. R. Cas. 600; *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233; *Cobb v. Illinois Cent. R. Co.*, 88 Ill. 394; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209; *Thayer v. Burchard*, 99 Mass. 508; *Michigan Cent. R. Co. v. Burrowes*, 33 Mich. 6; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 295; *Faulkner v. South. Pac. R. Co.*, 51 Mo. 311, 3 Am. Ry. Rep. 293; *Chicago, etc., R. Co. v. Dawson*, 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Wibert v. New York, etc., R. Co.*, 18 Barb. (N. Y.) 36; *Blackstock v. New York, etc., R. Co.*, 1

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Bosw. (N. Y.) 77, 20 N. Y. 50, 75 Am. Dec. 372; Banker *v.* Long Island R. Co., 89 Hun (N. Y.) 202; East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 276; Cross *v.* McFaden, 1 Tex. Civ. App. 461; Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

It is the duty of a railroad company to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. Chicago & Alton R. R. Co. *v.* Dawson, 79 Mo. 296, 18 Am. & Eng. R. Cas. 521.

A provision in the charter of a railroad company requiring it to ship property in the order it is received at the depots, way stations, and places desired by the owners thereof, is not violated by failing to carry live stock loaded at a way station, but which, owing to the amount of business, could not have been carried on the first train passing without an extra engine, which must have been sent out from a distance and at night. Michigan S. & N. I. R. Co. *v.* McDonough, 21 Mich. 165.

But a railroad company cannot excuse the breach of a contract to receive and transport cattle upon a certain day by the fact that it was so crowded with business upon that day and during the time of the subsequent delay that it had no empty cars in which to receive the cattle. Gulf, C. & S. F. R. Co. *v.* McCorquodale, 35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. 80.

And where a carrier receives goods for a point beyond its line, a failure to carry to the end of its line and deliver or offer to deliver to the next carrier is not excused merely by the fact that there is a block of freights on the next carrier's line and no room for the goods in the initial carrier's depot at the end of its line, which facts were known to its agent at the time of the reception of such goods. McLaren *v.* Detroit & M. R. Co., 23 Wis. 138.

10. Storms.

a. In General.

A carrier of live stock is not liable for injuries thereto caused by a delay, where the delay is caused by atmospheric conditions beyond the carrier's control, making it impossible to get telegraphic shipping orders; but to excuse such delay the carrier must have exercised due care to protect the property from injury during the delay. International & G. N. R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622.

A snow storm so severe as to hinder and delay a railroad company in the performance of its duties is such an act of God as to relieve the company from liability for loss or injury resulting from a delay in shipping live stock within a reasonable time. Ballentine *v.* North Mo. R. Co., 40 Mo. 491; Black *v.* Chicago, B. & Q. R. Co., 30 Neb. 197, 46 N. W. 428.

Snow storms of sufficient violence or duration to obstruct the passage of trains are a sufficient excuse, during their continuance, for a delay by a carrier in shipping live stock; but such violent storms or excessive cold weather should hardly be regarded as an extraordinary event in the latitude of northern Missouri during the months of December and January. Pruitt *v.* Hannibal & St. J. R. Co., 62 Mo. 527.

b. Knowledge of Distant Snow Storm on Connecting Line.

But mere knowledge of the existence of a snow storm a thousand miles away, on a connecting line, is not such definite knowledge of the existence of an obstruction as will prevent the carrier from excusing itself for a delay caused by the snow. Palmer *v.* Atchinson, etc., R. Co., 101 Cal. 187.

c. Authority of Agent to Contract for Shipment of Live Stock during Very Cold Weather.

Railroad agents are placed at stations for the express purpose of receiving and forwarding freights and making contracts with refer-

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ence thereto; and where an agent has agreed to receive and ship stock at a particular time the company is bound thereby, unless a delay in shipping was due to some unforeseen event, such as the law recognizes as sufficient. So *held*, where a railroad company insisted that its agent was not authorized to contract for the shipment of live stock during very cold weather. *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

11. Floods.

Where an express company accepts horses for shipment, knowing at the time that a portion of its route has been interrupted by floods, it cannot escape liability for injury to such stock, caused by another company, to which the same has been delivered for transportation, by invoking as a defence an act of God. *Adams Express Company v. Jackson (Tenn.)*, 55 Am. & Eng. R. Cas. 319.

12. Washouts.

Common carriers of live stock cannot excuse a delay in shipping cattle by reason of a washout on its road, where it appears that the stock would have passed the place of the washout before it occurred if they had been shipped promptly. *Gulf, C. & S. F. R. Co. v. McCorquodale*, 35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. 80.

13. Military Control.

Where a road is under the military control of the government and is not permitted to receive freights from individuals, except upon an order of a proper army officer, it is not liable for refusing to receive freights from individuals. In such a case the fact that goods had been sold to the government does not authorize it to receive them for shipment without an order from such army officer. *Illinois C. R. Co. v. Phelps*, 4 Ill. App. 238.

Where a person desirous of shipping a large quantity of corn over a railroad to Cairo stored the same in a warehouse on promise of the railroad company to transport it as soon as cars could be procured for the purpose, but the company never received or receipted for the same, and was unable to forward the same for want of cars and for the reason that the road was controlled by the military authorities of the United States, who refused to give permits to ship the same, and in consequence of which the grain was injured by exposure, etc.—*held*, that under the circumstances the company was not liable to the owner of the grain for the delay in furnishing transportation, there being no contract to transport the same, and the same never having come to its possession for transportation. *Illinois C. R. Co. v. Hornberger*, 77 Ill. 457.

But an order of the military power of the government that a railroad company should transport government freights to the exclusion of all private property, if necessary, will not release the company from its obligation to receive and transport private property, where it appears that the government did not actually assume control of the road and where the company still held itself out as a common carrier, and there was no evidence of a necessity to exclude private property; and especially is this so where the parties offering freight are government contractors and the freights tendered are military supplies. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

In this case it is said in the opinion: "If defendant held itself out to the world as a common carrier, and had permission to carry other property than that belonging to government, the mere fact that government demanded its services and at any time may have excluded all property from transportation except its own, would afford no excuse for the defendant refusing to take the grain of plaintiff offered or delivered to it. And this for the simple reason, that it would be liable for not doing that which, as a carrier, it offered to the world to do and had the power and capacity to perform. It is not at all difficult to understand that defendant may have been subject to military control, and the military officers of the government may have used the railroad to the extent of their requirements, and have had the

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authority at any time to have appropriated it entirely to public use, yet all the time defendant may have transacted the business of a public carrier, and held itself out to the world as such, and at the same time had the ability to carry all property offered to it, and the permission of the military authorities so to do. In that case it cannot be earnestly insisted that it would not be held liable for omission or neglect of the duties it assumed."

14. Strikes and Boycotts.

A railroad doing business as a common carrier has no right to refuse to deliver to, or receive from, a connecting railroad, cars of such connecting line, either loaded or empty, or freight of any kind which is ordinarily transported between railroad companies according to the proper and usual course of business; and it is no excuse for the action of a railroad company in so refusing cars or freight properly offered that the receiving of them might or probably would involve the company in a strike and boycott of employees, which exists on and against the road from which it so refuses to receive the cars or freight. *Beers v. Wabash, St. Louis & Pacific R. Co.* (C. C.), 35 Am. & Eng. R. Cas. 646, 34 Fed. 244.

Uncontroverted allegations, showing a quite general and largely injurious refusal and neglect of performance of the duties of carrier by a railroad company, establishes a case for the interference of the state; and railroad corporations cannot refuse or neglect to perform their public duties pending a controversy with their employees over the cost and expense of doing them, where it does not appear that the employees committed any unlawful act, or that there was an illegal combination compelling them to stop working. *People v. New York, C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345, reversing 2 Civ. Pro. 82.

15. Duty to Notify Shipper of Existence of Obstructions to Traffic.**a. In General.**

It is the duty of a carrier to notify its shippers of obstructions which will necessarily cause delay. *Schwab v. Union Line*, 13 Mo. App. 159.

It is the duty of the carrier when applied to for cars to advise the shipper of the situation and the circumstances which would likely occasion any unreasonable delay; and if he does not so advise and obtain consent either express or implied, to the delay, he becomes bound to carry the goods within a reasonable time; and he will not be heard to say that his delay was caused by some contingency. And such unavoidable difficulty, though wholly unknown and unanticipated at the time of acceptance, will not excuse him. *Guinn v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 453.

Where one makes a contract with a railroad company for the transportation of goods, and delivers them, ready for transportation, he has a right to rely upon the fulfilment of the contract until it is repudiated, or he is notified that the company cannot or will not transport the goods within a reasonable time, and he is not obliged to procure their immediate transportation over another line. *Louisville, etc., R. Co. v. Flanagan*, 32 Am. & Eng. R. Cas. 532, 113 Ind. 488, 3 Am. St. Rep. 674.

But neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of goods, if such notice would not have avoided the injury. *Regan v. Grand Trunk R. Co.*, 61 N. H. 579.

b. Receiving Perishable Freight with Knowledge of Probable Delay on Connecting Line.

A railroad company accepting perishable freight for transportation over its own and connecting roads must forward the same promptly, to the extent of its ability, until it has delivered or offered to deliver it to the connecting carrier, and is not excused from the performance of such duty by the mere fact that its agent supposed there would be

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a delay in the forwarding of such freight by the connecting carrier. *Blodgett v. Abbott*, 72 Wis. 516, 7 Am. St. Rep. 873, 40 N. W. 491.

c. Knowledge of Blockade by Snow.

A railroad cannot excuse a delay in carrying freights by showing that its road, or a connecting line, was blockaded by snow, where the company's agents knew of the blockade and failed to notify the shipper. *Great Western R. Co. v. Burns*, 60 Ill. 284, 12 Am. Ry. Rep. 309.

16. Unconstitutional Law.

An unconstitutional law, prohibiting railways from carrying Texas or Cherokee cattle into or through the state, being void, will afford no excuse for a refusal or delay in receiving and shipping such cattle when offered. *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613.

III. PERFORMANCE OF DUTY ENFORCED BY INJUNCTION.

A. IN GENERAL.

Where there is a continuing breach of the duty to receive and carry freight, the party injured can have an injunction issued compelling its performance. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 16 Am. St. Rep. 926; *Rogers L. & M. Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 293, 54 Fed. 746; *Chicago, Burlington & Quincy R. Co. v. Burlington, Cedar Rapids & Northern R. Co.*, 34 Fed. 481.

1. Combination to Give Express Company Monopoly.

Plaintiffs filed a bill showing that they manufacture locomotive engines, and charged a combination between a railroad company over whose road the engines must be shipped and certain directors, to organize an express company to do all the business of shipping over the road, with reduced liabilities, whereby the cost of shipping locomotives would be increased from about \$31 to \$250 each: *held*, that plaintiffs had no adequate remedy at law, and that an injunction would issue to restrain the parties from doing anything to prevent carrying such engines as ordinary freight. *Rogers L. & M. Works v. Erie R. Co.*, 20 N. J. Eq. 379.

2. Interference with Interstate Commerce.

Where one connecting road is about to refuse another equal facilities for the exchange of traffic, in violation of the Interstate Commerce Act, § 3, because of a boycott declared by a labor organization, a court of equity may compel such interchange by mandatory injunction. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 293, 54 Fed. 746.

In this case it is said in the opinion: "Now the normal condition—the status quo—between connecting common carriers under the Interstate Commerce Law is a continuous passage of freight backward and forward between them, which each carrier has a right to enjoy without interruption, exactly as riparian owners have a right to the continuous flow of a stream without obstruction. Since Lord Thurlow's time, the preliminary mandatory injunction has been used to keep clear the stream. *Robinson v. Lord Byron*, 1 Brown Ch. C. 588; *Lane v. Newdigat*, 10 Vesey 192. So an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this. The Interstate Commerce Law recognizes the necessity for such a remedy; for in summary equity proceedings at the instance of the Interstate Commerce Commission, provided in section 16, as amended in 1889, express power to issue injunctions, mandatory or otherwise, to prevent violations of the orders of the commission, is given to circuit courts. Moreover, by a subsequent section, upon the application of an interested person, the district and circuit courts may issue a mandamus to compel compliance by the common carrier with the provisions of

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the act. As this latter proceeding is denominated cumulative in the statute, it does not prevent the remedy by injunction; nor would it, in any event, because the inadequacy of the legal remedy which justifies equitable intervention by injunction is only the inadequacy of a recovery in damages by action at law. *Attorney General v. The Mid-Kent Railway Co.*, L. R., 3 Ch. 100."

In *Chicago, Burlington & Quincy R. Co. v. Burlington, Cedar Rapids & Northern R. Co.*, 34 Fed. 481, it was held that the duty imposed upon railroad companies by the Interstate Commerce Act, of receiving from connecting roads freight and passengers, is one which the federal courts will enforce by mandatory injunction where the injury resulting from its nonperformance is continuing; and it was further held, following the case of the Wabash Railroad, that a strike of locomotive engineers and firemen upon the petitioner's road, causing a boycott against it by the engineers and firemen of all other lines, defendant's included, and endangering a strike on defendant's line if it receives cars from plaintiff, is no excuse for refusal to receive them. The court said: "In the next place, what disposition shall be made of the complainant's application for a mandatory injunction against the defendant company and its managing officers, compelling them to perform their duty as required by the law of both congress and the state of Iowa? These defendants have appeared by counsel and admitted the truth of the allegations of the bill, and they do not deny that they are required by law to receive and move the complainant's cars. They admit that they have refused to perform this duty, and they give as a reason for their refusal that, if they receive and haul the complainant's cars their firemen and locomotive engineers will abandon their service and leave the company without the means of operating their lines. There can, of course, be no doubt about the law of both the general and state governments requiring the defendant corporation to receive and move the complainant's cars, whether empty or loaded. The law of Iowa provides that it shall be the duty of any railway corporation to receive and transport the empty or loaded cars furnished by any connecting road to be delivered at any station or stations on the line of its road to be loaded or discharged, or reloaded and returned to the road so connecting. 1 McClain's Ann. St., p. 367, § 10.

"The United States Interstate Commerce Act (Act Cong., Feb. 4, 1888; St. at Large, 1885-87, p. 379) provides that every common carrier shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic, between their respective lines, and for the receiving, forwarding and delivery of property and passengers to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

"Now, the question is, what shall be obeyed,—the law of the land, or the order of the chiefs of the locomotive engineers? Shall a railway company refuse obedience to the express provisions of the statutory law because some of its employees threaten to quit its service, and thus stop the running of its trains? Shall the court presume that they will carry out such threats, and deny relief to the complainant upon that presumption? No temporary inconveniences to the defendant company, or the public whom it serves are, in my judgment, for one moment to be compared with the fatal consequences which must ensue from a precedent by which it would be established that a railway company may, in violation of the law of the land, refuse to receive and haul the cars of a connecting line at the command of any irresponsible persons, or from its own belief and apprehension that its employees will leave its service and stop the operation of its lines." Such an excuse as this is wholly inadmissible, and it must be set aside.

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3. Apprehension of Interruption to Traffic Not Sufficient Ground.

An injunction to a company to work traffic will only be issued where there is a well-founded ground of complaint in respect of past working, and the question of proper facilities for the receipt, etc., of traffic at a junction does not arise until the junction exists. *Doublin Whiskey Distillery Co. v. Midland G. W. R. Co.*, 4 Ry. & C. T. Cas. 32.

IV. WHETHER DUTY MAY BE ENFORCED BY MANDAMUS.**A. IN GENERAL.**

Even though the state has suffered no injury and the private person injured has a sufficient remedy at law, a mandamus may issue at the instance of the state to compel a railroad company to receive and carry freight. *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *People v. St. Louis, etc., R. Co.* (Ill.), 12 Am. & Eng. R. Cas., N. S., 227; *Com. v. Eastern R. R. Co.*, 103 Mass. 258; *State v. Spokane St. Ry. Co.* (Wash.), 11 Am & Eng. R. Cas., N. S., 62; *State v. Sioux City & Pac. R. Co.*, 7 Neb. 357; *Rex v. Barker* (Eng.), 3 Burr. 1267.

Where the injury resulted from the nonperformance of a railroad company's duty as a common carrier to receive and transport freight the connecting carrier or shipper sustaining injury may obtain relief in mandamus proceedings against the carrier in fault. *Toledo, etc., R. Co. v. Pennsylvania R. Co.*, 54 Fed. 730, 53 Am. & Eng. R. Cas. 307; *Chicago, etc., R. Co. v. Burlington, etc., R. Co.*, 34 Fed. 481; *Rogers L. & M. Works v. Erie R. Co.*, 20 N. J. Eq. 379. See also, *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law may institute mandamus proceedings under the act of March 3, 1873 (17 U. S. St. at L. 509), without the sanction of the attorney general. *Hall v. Union Pac. R. Co.*, 3 Dill. (U. S.) 515, affirmed in 91 U. S. 343; *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

In the last case it is said in the opinion: "The appellants contend that the court erred in holding that Hall and Morse, on whose petition the alternative writ was issued, could lawfully become relators in this suit on behalf of the public without the assent or direction of the attorney general of the United States, or of the district attorney for the District of Iowa. They were merchants in Iowa, having frequent occasion to receive and ship goods over the company's road; but they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally. The question raised by the objection, therefore, is whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator. Clearly in England it may. Tapping, on Mandamus, p. 28, asserts the rule in that country to be, that, 'In general, all those who are legally capable of bringing an action are also equally capable of applying to the court of King's Bench for the writ of mandamus.' This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true, we think, in case of applications to compel the performance of duties to the public by corporations. In *Rex v. R. Co.*, 2 Barn. & Ald., 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a mandamus should not issue commanding them to lay down again and maintain part of a railway which they had taken up. Under an act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the attorney general was needed. Other cases to

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the same effect are numerous. *Clarke v. Canal Co.*, 6 Ad. & Ell., N. S., 898, 1 Chit. 700."

The performance of the duty to receive and transport freight is compellable on behalf of the people, through the courts, by mandamus; and their attorney general is the proper officer to set the process in motion. The fact that injured individuals may have private remedies for damages sustained does not preclude the state from its remedy by mandamus, where there is a general or partial suspension of the duty of receiving or transporting freight affecting large numbers of people. *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345, reversing 2 Civ. Pro. 82.

In this case the court, per Davis, P. J., said: "The writ of mandamus has been awarded to compel a company to operate its road as one continuous line (*Union P. R. Co. v. Hall*, 91 U. S. 343); to compel the running of passenger trains to the terminus of the road (*State v. Hartford & N. H. R. Co.*, 29 Conn. 538); to compel the company to make fences and cattle guards (*People v. Rochester & State Line R. Co.*, 14 Hun 373, 76 N. Y. 294); to compel it to build a bridge (*People v. Boston & A. R. Co.*, 70 N. Y. 569); to compel it to construct its road across streams so as not to interfere with navigation (*State v. Northeastern R. Co.*, 9 Rich. L. 247); to compel it to run daily trains (*Re New Brunswick, etc., R.*, 1 P. & B. 667); to compel the delivery of grain at a particular elevator (*Chicago & N. W. R. Co. v. People*, 56 Ill. 365); to compel the completion of its road (*Farmers' Loan & Trust Co. v. Henning*, 17 Am. L. Reg., N. S., 266); to compel the grading of its track so as to make crossings convenient and useful (*People v. Duchess & C. R. Co.*, 58 N. Y. 152; *New York Cent. & H. R. R. Co. v. People*, 12 Hun 195, 74 N. Y. 302; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489); to compel the re-establishment of an abandoned station (*State v. New Haven & N. Co.*, 37 Conn. 154); to compel the replacement of a track taken up in violation of its charter (*Rex v. Severn & W. R. Co.*, 2 Barn. & Ald. 646); to prevent the abandonment of a road once completed (*Talcott v. Pine Grove*, 1 Flip. 145); and to compel a company to exercise its franchise (*People v. Albany & V. R. Co.*, 24 N. Y. 261). These are all expressed or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the ultima ratio of their existence—the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the state, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but it is then powerless to complete the doing of the thing itself.

"We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers."

When a corporation undertakes to operate a railroad franchise, it assumes all the duties and obligations which spring by law from the character of its business, and from the customs incidental to it. It tenders a continuing offer to the general public that it will perform these duties, for the benefit of each and every one of them, when demanded at its hands. When any member of the public makes a demand upon it under such general offer, there immediately results a civil obligation on the part of the company in favor of the party making the demand, enforceable in the name of such party, through the usual remedies by which contracts are enforced. The party seeking the enforcement of the obligation by mandamus cannot be driven by the corporation to an action for damages, nor can it, by the payment of money, leave unperformed its specific affirmative legal duty. *Cumberland Tel. & Tel. Co. v. Morgan's L. & T. R. Co.* (La.), 13 Am. & Eng. R. Cas., N. S., 71.

Chicago, etc., Ry. Co. *v.* Calumet Stock Farm**B. APPLICATION OF RULE.****1. Discrimination.**

Where a complainant seeks to force a railroad company to afford it facilities equal to those given to a favored rival, the court may issue a mandamus to compel it to serve both alike. *State ex rel. v. Texas & P. Ry. Co. (La.)*, 18 Am. & Eng R. Cas., N. S., 399.

2. Strikes.

Where a railroad company refuses to carry freight and passengers on the ground that its employees refused to work except for increased wages, a mandamus may issue, at the suit of the commonwealth, represented by the attorney general, to compel it to do so, where there is no violence or force used by such employees to prevent the operation of trains; and it is no defense to such proceedings that the state has suffered no injury, and that private shippers or passengers have an adequate remedy at law in suits for damages. *People v. New York, C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 8 Civ. Pro. 11.

3. Failure to Offer for Transportation.

But mandamus does not lie, when the relator who seeks to transport his coal over a lateral railroad has not opened or mined his coal or offered it in cars for transportation. *Com. ex rel. v. Corey*, 2 Pittsb. (Pa.) 444.

CHICAGO & N. W. RY. CO. *v.* CALUMET STOCK FARM.*(Supreme Court of Illinois, Dec. 18, 1901.)*

[61 N. E. Rep. 1095.]

Injury to Live Stock—Right to Prove Gross Negligence under Allegation of Willfulness and Recklessness.

Where plaintiff alleged willful and reckless negligence in causing the accident which injured live stock being shipped on defendant's railroad, he had the right to prove gross negligence.

Same—Sufficiency of Evidence of Willfulness and Recklessness.

In an action for injuries to horses being shipped on defendant's railroad, the groom testified that he was in the car when it was struck in making a flying switch; that he was thrown over, and his lantern knocked over; that the halters of the three horses were broken, and the jolt of the car threw the horses down. Another witness testified that he was sitting in the door of the car, and was thrown out by the jar, and, when he looked in the car, the horses were down, and that one of the doors had struck a sulky, smashing a wheel, and that the drawbar had been smashed: *held*, that the evidence sustained a verdict for plaintiff on allegations of negligent, willful, and reckless misconduct.

Same—Limiting Liability—Absence of Assent to Bill of Lading.

Where, in an action for injury to horses shipped on defendant's railway, defendant contends that its liability was limited by a bill of lading which in its entirety constituted both a receipt and contract, but there was no evidence in the record that the plaintiff assented thereto, he could not be held bound thereby.

Same—Same—Gross Negligence.

Where, in an action for injuries to horses being shipped on defendant's railway, the evidence showed gross negligence, the plaintiff was not bound by the contract contained in a bill of lading limiting defendant's liability.

Same—Same—Assent to Bill of Lading and Negligence—Questions for Jury.

Where defendant contended that its liability was limited by a contract contained in a bill of lading, the questions of the plaintiff's

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assent thereto, and of the defendant's negligence, were questions of fact, which, having been determined adversely to defendant by the trial and appellate courts, cannot be considered on appeal to the supreme court.

Same—Elements of Damages—Instructions.

An instruction that, in estimating plaintiff's damages, the jury might consider the difference in the fair market value of the horses at the time of the shipping and their fair market value after the injury, and also whatever sums the plaintiff paid out in endeavoring to cure the horses, and of loss sustained by plaintiff by reason of such injury, not exceeding the value of the horses, was correct, and not subject to the criticism that it did not limit the value of the horses to the time immediately before and after the injury, and assumed that plaintiff has been put to expense to cure the horses.

Same—Damages—Expert Testimony.

In an action for injuries to racing horses being shipped on defendant's railway, it was not error to permit witnesses who testified that they were engaged in buying, selling, and handling trotting and pacing horses, and had seen the plaintiff's horses before the injury, on the tracks and in races and knew their speed, quality, etc., to testify to their value.

Witnesses—Impeachment—Affidavit of Stenographer Merely Accumulative—New Trial.

On the cross-examination of a material witness for the defendant, he was shown a statement in writing purporting to have been signed and sworn to by him, which fact he neither admitted nor denied. A witness for plaintiff, on rebuttal, testified that such statement was taken down in shorthand, typewritten, and was signed by defendant's witness, on which the statement was admitted for impeachment. On being recalled the defendant's witness heard the statement read, and denied making it or signing it: *held*, that on motion for new trial the affidavit of the stenographer who was said to have taken the statement, denying that fact, was cumulative, and by way of impeachment only, and was not ground for granting a new trial.

Appeal from appellate court, Second district.

Action by the Calumet Stock Farm against the Chicago & Northwestern Railway Company. Judgment for plaintiff was affirmed by the appellate court (96 Ill. App. 337) and defendant appeals. Affirmed.

Botsford, Wayne & Botsford, for appellant.

Aldrich & Worcester and J. F. Snyder, for appellee.

HAND, J. This is an action brought against the appellant for an alleged injury to three horses of appellee, caused by an accident to the car in which they were being shipped from Geneva, Ill., to Ft. Wayne, Ind. The declaration contained two counts. One charges negligent and the other willful and reckless misconduct on the part of the appellant. The general issue was filed, and on the trial the jury returned a verdict for \$1,500, and a judgment was rendered against appellant for that amount, which has been affirmed by the appellate court for the Second district, and a further appeal has been prosecuted to this court.

The evidence introduced on behalf of appellee tended to show that on August 10, 1893, it delivered to appellant, at Geneva, Ill., three horses, viz. Roy Wilkes, Nutonian, and Lady Roy, which were valuable for racing purposes, to be

transported from that place, by way of Chicago, to Ft. Wayne, Ind.; that the horses were put on board a stock car, which, after it had reached Chicago, was set out of the train to which it had been attached, and was standing in appellant's yard, and that a train, in backing up to connect with the car, struck the car with great force, and that the horses were thrown down and injured. There was a conflict in the evidence as to whether the car, at the time of the accident, was in the yard of the defendant or the yard of the Pan Handle road, and as to whether the horses were injured at the time of said accident.

It is first contended by appellant that, as the declaration charges willful and reckless negligence in causing the accident, such negligence must be proven to sustain the action. Under this declaration, which charged the appellant with negligent, willful, and reckless misconduct, there is no question but what the appellee had the right to prove gross negligence; but, were the contention of appellant correct, we are of the opinion the jury would have been justified in finding that the evidence showed the car containing said horses was handled in a willful and reckless manner. William Monteith, a groom who was on the car, testified: "It was dark. We went in the yards at Chicago, lay there a couple of hours; made a flying switch, and struck our car. The drawbar was broken. When the car struck I was on my knees, changing the mare's bandages. I was thrown on my back. The lantern was knocked over; set fire to the straw. Roy Wilkes was at one end of the car. The horses were tied. When the car struck, halters were broken. The jolt of the car threw the horses down. The mare was down when I saw her. She fell down. When she came up she struck her head against the car. Nutonian went down. Made three attempts before he got up. He was strained across his loins. He tried to get up, and could not until I lifted him. Roy Wilkes went down. We did not get out of the Chicago & Northwestern yards until the following night. They were fixing the car." F. H. Wardlow, who was in the car, testified: "The accident was in the Northwestern yards. I was sitting in the car door. Roy Wilkes stood back and the other two horses stood in front,—in the front end of the car. The car struck the side where Roy Wilkes was standing. It knocked me out of the door. When I looked in the car he was standing on his haunches. The other two horses, one was lying on top of the other. The lantern Monteith had was knocked down. One of the doors struck the trotting sulky and smashed one wheel. Saw the next morning the drawbar had been smashed." Kelley Freshwater, who was also in the car, testified: "The car hit the train hard, bounded back, put our lanterns out, knocked things down, threw down the doors on the south side of the car. Roy Wilkes kind of tripped and fell. His head struck the water bucket. The horses kind of jumped up in the air,

broke their halters, and Roy Wilkes struck his head with terrible force on the outside of the car. It was dark. Monteith went for a light. We gathered up the lanterns. Roy Wilkes was standing in the middle of the car and the other two horses on either side, with their halters broken. Trunks were slewed around,—the big chest turned around more than it was. Roy Wilkes had some hard knocks on the side of his head. Lady Roy had a little cut which she got from the trunk. Nutonian had a cut on the ankle that he got from struggling in the accident."

It is next contended that the horses were shipped under a contract which limited the liability of the appellant to the sum of \$100 for each horse and to injuries which occurred upon its own line. The contract limiting the liability of the appellant is contained in a bill of lading which, in its entirety, constitutes both a receipt and contract, and is not binding upon the appellee, for two reasons—First, there is no evidence in the record that the appellee assented thereto; and, secondly, appellant cannot relieve itself, by contract, for an injury caused by its gross negligence. Furthermore, the questions of such assent and negligence are questions of fact, which had been determined adversely to the appellant both by the trial and appellate courts. *Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Railway Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587. In *Railway Co. v. Simon*, *supra*, on page 653, 160 Ill., and page 597, 43 N. E., we say: "Where a contract limiting the liability of the carrier is contained in a bill of lading which, in its entirety, constitutes both a receipt and contract, the onus is on the carrier to show the restrictions of the common-law liability were assented to by the consignor. *Field v. Railroad Co.*, 71 Ill. 458; *Boscowitz v. Express Co.*, 93 Ill. 523, 34 Am. Rep. 191. And whether there is such assent is a question of fact. The mere receiving the bill of lading, without notice of the restrictions therein contained, does not amount to an assent thereto. *Express Co. v. Haines*, 67 Ill. 137; *Anchor Line v. Dater*, 68 Ill. 369; *Express Co. v. Schier*, 55 Ill. 140; *Transportation Co. v. Joesting*, 89 Ill. 152; *Transportation Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51. In this case, whether the limitation in the bill of lading was assented to by the consignor was a question of fact, determined by the appellate and trial courts adversely to appellant, and no question of law is presented in this court under which those questions of fact are before us." And in *Railway Co. v. Chapman*, *supra*, on page 107, 133 Ill., page 418, 24 N. E., page 510, 8 L. R. A., and page 591, 23 Am. St. Rep., it is said: "A common carrier cannot, even by express contract, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants or employees. Whatever may be the rule elsewhere, in this state the common carrier cannot contract for exemption from responsibility for a failure on its part, or that

of its servants, to exercise ordinary care in the transaction of its business. If the carrier may by contract limit its liability for gross negligence or willful misfeasance to any extent, it may contract for total exemption. A contract for exemption from liability for its torts being void, as against public policy, it cannot shield itself as to any portion of the damages to person or property occasioned by its gross negligence or willful misconduct. As we have seen, it may protect itself against fraud by requiring the consignee to state the value of the thing shipped; but, when it receives property for transportation, it must exercise reasonable care until it reaches its place of destination, and will not be permitted to absolve itself from that responsibility."

The court gave to the jury, upon behalf of the appellee, the following instruction, which the appellant claims was reversible error: "The court instructs the jury that, if you find for the plaintiff in this case, that in estimating the plaintiff's damages you have a right to take into consideration the difference in the fair market value of the horses in question, and each of them, at the time of the shipping of said horses from Geneva, Illinois, to Fort Wayne, Indiana, and their fair market value after the injury complained of, as shown by the evidence in this case, and also whatever sum or sums of money the evidence shows the plaintiff paid out in endeavoring to cure said horses, or either of them, from the injuries complained of, and all loss sustained by the plaintiff by reason of such injury, if any such loss is shown by the evidence in this case, not exceeding the value of said horses and not exceeding the amount claimed in the plaintiff's declaration." The criticism made upon this instruction is that it does not limit the market value of said horses to the time immediately before and after said injury, and assumes that the appellee has been put to expense in endeavoring to cure said horses from the injury complained of. The instruction, in case the jury find for the appellee, clearly limits the market value of the horses to the time immediately preceding and following the injury, and confines the jury to such expenses as the evidence shows the appellee to have incurred in endeavoring to cure said horses, and in our opinion is not subject to the criticism made thereon.

The court admitted certain testimony offered by the appellee as to the value of said horses immediately before and subsequent to the injury, which was objected to by the appellant, on the ground that the witnesses who so testified did not have sufficient knowledge upon the subject to authorize them to express an opinion as to the value of said horses. The witnesses who testified were engaged in buying, selling, and handling trotting and pacing horses, had seen the horses of appellee frequently before the injury, upon the track and in races, and knew their speed, quality, etc. We think this testimony competent, the weight thereof being a question for the jury. In any event, this evidence did the appellant no

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harm, as the remaining evidence was sufficient to support the verdict. *Railroad Co. v. Wedel*, 144 Ill. 9, 32 N. E. 547; *Doll v. People*, 145 Ill. 253, 34 N. E. 413.

The appellant, upon the trial, called as a witness one Freshwater, who gave material evidence in its behalf. On cross-examination he was shown a statement in writing purporting to have been signed and sworn to by him, and asked if he signed and swore to it. He neither admitted nor denied signing and swearing to said statement. The appellee, on rebuttal, called its manager and bookkeeper, who each testified that said statement was taken down in shorthand, written out upon the typewriter, and signed and sworn to by Freshwater, and upon such proof the court admitted the statement in evidence for the purpose of impeachment. After Freshwater had heard the statement read he was recalled, and denied making the same, or that he signed and swore to it. In support of a motion for a new trial, the appellant filed the affidavit of the stenographer who said manager and bookkeeper testified had taken such statement in shorthand and transcribed the same upon the typewriter, who denied she had taken or transcribed the same, or that she was in the employ of appellee at the date the same was purported to have been made. The appellant insists that it was surprised upon the trial by the introduction of said statement, and urges upon the showing made the court erred in refusing to grant it a new trial. The newly-discovered evidence was cumulative, and by way of impeachment only, and was not conclusive. The law is well settled that a new trial will not be awarded on the ground of newly-discovered evidence when the evidence is cumulative or by way of impeachment merely, and in its nature is not conclusive. *Insurance Co. v. Gould*, 80 Ill. 388; *Martin v. Ehrenfels*, 24 Ill. 187; *Friedberg v. People*, 102 Ill. 160; *Grady v. People*, 125 Ill. 122, 16 N. E. 654; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401. We find no reversible error in this record. The judgment of the appellate court will therefore be affirmed.

Judgment affirmed.

SIAS et al. v. ROCHESTER RY. CO.

(*Court of Appeals of New York, Dec. 20, 1901.*)

[62 N. E. Rep. 132.]

Street Railways—Injury to Passenger—Leased Track.*

Plaintiff's decedent was riding on defendant's tracks on a car

*As to whether lessor is liable for lessee's negligence, see *Perry v. Western North Carolina R. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 659 et seq.

As to the liability for injury to passenger in collision caused by negligence of company having statutory running powers over defendant's line, see *Central Trust Co. of New York v. Denver, etc., R. Co.* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 513, and note, 522.

As to who are liable for defects in leased road, see 5 Am. & Eng. R. Cas., N. S., 530 et seq.; 6 Rap. & Mack's Dig. 218.

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belonging to and operated by another street railway which had contracted with defendant to run its cars over defendant's tracks, and while standing on the platform was struck by a tree growing near to the track: *held*, that it was proper to direct a nonsuit, as he was not a passenger on defendant's road to whom any duty as such was owing by defendant.

O'Brien, J., dissenting.

Appeal from supreme court, appellate division, Fourth department.

Action by Henry Sias and others, administrators of Charles H. McKee, deceased, against the Rochester Railway Company. From a judgment of the appellate division (64 N. Y. Supp. 1148) affirming a judgment for defendant, plaintiffs appeal. Affirmed.

Henry Purcell, for appellants.

Charles J. Bissell, for respondent.

GRAY, J. The action was brought to recover damages of the defendant, the Rochester Railway Company, for causing the death of the plaintiffs' intestate through negligence. The defendant operated a street railway in the city of Rochester, and the accident happened upon its Lake Avenue Line. The tracks were located between the curb of the street and the sidewalk, and for the whole distance were more or less close to the trees which were grown upon the sides of the avenue. By a traffic arrangement between the defendant and the Rochester Electric Railway Company, the latter, which operated an electric trolley road from Ontario Beach to the city line, ran its cars over the former's tracks to points within the city limits. There was no lease of either road, and each company operated and managed its own trains of cars. At the time of the accident the deceased was riding upon one of the cars of the Rochester Electric Railway Company, as the proofs conclusively show, and at a point upon the defendant's Lake Avenue Line, while standing upon the platform and projecting his person beyond the side of the car, he was struck upon the head by a tree growing in close proximity to the track, and received the injuries which were alleged to have subsequently caused his death. The tree stood within one foot and seven inches of the rail. Notwithstanding that the contract of the deceased for his carriage was with the Rochester Electric Railway Company, it is sought to make the defendant liable for the results of the accident, and the negligence relied upon to create the liability consists in the construction of its railway in such close proximity to a tree. It sustained no contractual relations to the deceased, and none such could be predicated upon a mere traffic arrangement between the two companies, which permitted the carrier of the deceased, for a compensation, to run its cars over the defendant's tracks. The defendant had the right to construct its tracks as and where it did, and what duty of care and precaution it was under for the safe operation of its cars it owed to its pas-

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sengers. How it performed its duty we are not informed, and it is immaterial here. We know that cars could pass the tree. If there was any negligence, from which the plaintiffs' intestate suffered, it could only have been in the manner in which the Rochester Electric Railway Company operated its cars upon such a track. If the construction of its cars was defective, or if their operation and management were such as not to furnish adequate security for passengers, then that company would be at fault. We do not think that the defendant is chargeable, upon the proofs, with the neglect of any duty owing to the plaintiffs' intestate, and for that reason the dismissal of the complaint was proper.

The judgment appealed from should be affirmed, with costs.

O'BRIEN, J. (dissenting). The plaintiffs' intestate, while a passenger in a car over the defendant's railroad, received an injury on the 4th day of September, 1892, which resulted in his death in an insane asylum on the 14th day of December, 1894. On the third trial of the action the plaintiff was nonsuited, and the nonsuit was sustained at the appellate division, although on a previous appeal the same court decided that the case was one for the jury. 92 Hun, 140, 36 N. Y. Supp. 378; 18 App. Div. 506, 46 N. Y. Supp. 582; 51 App. Div. 618, 64 N. Y. Supp. 1148. The question presented by this appeal is whether there was any evidence on the last trial for the consideration of the jury, since, if there was, it must be admitted that the nonsuit was improper.

The learned counsel for the defendant contends that, inasmuch as the death did not occur within a year and a day from the date of the accident, there can be no recovery. This was a rule of the ancient common law, applicable to cases of homicide, originating in doctrines peculiar to the feudal system; and it has no application to the case at bar, which is brought upon a statute which in itself was a wide departure from the rules of the common law. The street in which the defendant's railroad is operated is 100 feet wide. About 40 feet or more of the center of this street is occupied by an asphalt driveway fringed with parks and lawns. The defendant's double track is therefore placed near the curb on both sides of the street, and one of the tracks was placed so close to a tree that a notch had to be cut into it in order to permit the roof of the car to pass. The tree was about four inches from the side or body of the car. The deceased was traveling in the night, and it was announced in the car that there was a fire in the vicinity. The deceased, in order to see or locate the fire, got up from his seat in the car, and, standing upon the platform, protruded his head about four inches outside of the body of the car, when his head came in collision with the tree. It was this collision that resulted in his subsequent insanity and death, and the sole question is whether the case was one of law for the court or of fact for the jury. There has been much discussion and conflict of opinion with respect

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to this case in the courts below, and it all centers in this single proposition. But on the argument in this court the learned counsel for the defendant did not rest his case upon that proposition, since he argued and submitted another question, which will now be briefly referred to.

It appears that the car in which the deceased was a passenger was not owned by the defendant, but by another railroad company that had a traffic agreement with the defendant to run its cars over the road under the defendant's rules and regulations, dividing the fares with the defendant. The conductor and motorman on the car in question were employed by the other railroad, but the defendant furnished and controlled the power that operated the cars on the road. On this state of facts it is earnestly contended in behalf of the defendant that the action has been brought against the wrong railroad, and that it should have been prosecuted against the railroad that owned the car and that controlled the servants operating it. I do not think there is anything of substance in this contention. The statute under which this action is brought permits a recovery only against the party whose wrongful act or neglect caused the injury resulting in the passenger's death. The plaintiff could maintain this action against the railroad that owned the road and the track for the plain reason that it was guilty of the wrongful act or neglect resulting in the injury, or at least there was evidence for the jury on that question. If that railroad was properly sued, it is of no consequence that some other road was liable also; either or both may be liable, but it is enough that the defendant is. If the defendant is free from negligence as matter of law, it is difficult to see how the other road could be held, or why it would not have a complete defense, since it could be said that the accident was not due to any neglect of duty or any wrongful act on its part by reason of the location of the track. There is no claim made that the car in which the deceased was riding was in any way defective, nor is there any claim that the accident resulted from any negligence or improper conduct on the part of the motorman or conductor of the car. It was therefore impossible for the plaintiff, under the circumstances, to prove any wrongful act, neglect, or default on the part of the railroad that owned the car. It did not own the railroad, nor control it in any way; it did not build it; it was not responsible for the construction of the track so close to the tree, or for the existence of the tree so close to the car as to be a dangerous obstruction; it had no power to change the track or to remove the tree, or to avert the accident that happened; it was not charged with any duty in that regard. Possibly it might have been made liable for a breach of its contract to carry the passenger safely had the passenger survived. But it could not be held liable under the statute upon which this action is based, since it was not guilty of the wrongful act, neglect, or default which caused the injury.

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The defendant was the proper party in this action. It owned and built the railroad. It maintained and operated it. All the cars passing over the road were moved by its hand and will, since it furnished and controlled the motive power and enacted the rules and regulations under which they were operated. The compensation paid by the passengers, or some part of it, went into its treasury. It maintained the track within a few inches of the tree, and it permitted the tree to remain so close to the car that it could be found to be a dangerous obstruction. If the decedent had been injured, not by the tree growing close to the track, but as the result of a broken rail, I assume that no one would then contend that the defendant was not liable. This action is based upon an act or omission of the same character, and hence, if there was any cause of action at all, it was against the defendant, and not against some other railroad with which it had a traffic agreement.

In all the discussion that has been had thus far in regard to this case, I cannot perceive that it has ever been suggested that there was not evidence for the consideration of the jury in regard to the defendant's negligence. The defendant was engaged in exercising a franchise for the conveyance of the public by operating a railroad in a public street. It had the power and it was its duty to construct the railroad in such a way as not to endanger the safety of its passengers. If it constructed its track so close to a tree or any other physical obstruction as to endanger the safety of the traveling public, it could be held to have neglected its duty, and to have been wanting in that degree of care and prudence which the law imposed upon it, and so the courts have held in similar cases. *Benthin v. Railroad Co.*, 24 App. Div. 303, 48 N. Y. Supp. 503; *Tucker v. Railway Co.*, 53 App. Div. 571, 65 N. Y. Supp. 989; *Brown v. Railroad Co.*, 42 App. Div. 548, 59 N. Y. Supp. 672. The only phase of this case which furnishes an opportunity for minds to differ is the question of contributory negligence on the part of the deceased. He was not guilty of contributory negligence, as matter of law, unless this court is prepared to hold that a passenger on a street railroad, standing upon a platform, who protrudes his head four inches beyond the body of the car, thus coming in collision with a tree, is so guilty. We must be able to say that that was such an imprudent and reckless act on his part as to preclude his personal representatives from the right to recover in this action. There were no rules or regulations of the company against passengers riding or standing upon a platform. It appears that the deceased had traveled over the railroad the day before, and while upon the platform the conductor collected and received his fare. Contributory negligence cannot, therefore, be imputed to the deceased for the mere fact that he was standing upon the platform. If it is to be imputed to him at all, it must be for the reason that he protruded his

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head outside of the line of the car in order to see or locate the fire. I do not think that this is a reasonable or tenable view of the question. The deceased did nothing more than what perhaps the majority of mankind would have done under the same circumstances. If a passenger riding upon the railroad that runs past this capitol, on hearing that the capitol or city hall was on fire, should go upon the platform in order to see the fire, and, protruding his head four inches outside the body of the car, should come in collision with a trolley pole, a tree, or some other physical obstruction, it would be a very extreme, and, I think, unwarranted, view of his conduct to say that he was guilty of contributory negligence per se. It may be that some passenger in the car who was governed by unusual caution and foresight and gifted with great wisdom would remain in his seat unmoved, and regardless of the excitement around him, but the majority of the passengers would naturally be prompted to make some effort to see the fire. The conduct of the deceased is to be judged from the standpoint of ordinary prudence; that is to say, not by the prudence or caution of the very wise man, but by that of the average or ordinary man. If he acted only in the same way that the ordinary man would act under the same circumstances, it cannot be said as matter of law that he was guilty of negligence. This court has drawn a very distinct line between the cases where the negligence of the party may be adjudged by the court as matter of law and the cases where it must be determined by the jury as matter of fact. In the former case the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. But when it appears from the evidence produced that different minds may fairly draw different conclusions, then the case is for the jury. *Stackus v. Railroad Co.*, 79 N. Y. 464; *Clemence v. City of Auburn*, 66 N. Y. 334; *Smith v. Coe*, 55 N. Y. 678; *Harris v. Perry*, 89 N. Y. 308. It appears from the record that eleven judges of the court below have participated in some form in the discussion and decision of this question, five of whom seemed to have been of the opinion that the question was one of law for the court, while on the other hand six of them held that it was a question of fact for the jury, and among the latter was one of the present members of this court. This would seem to be very satisfactory proof that the conduct of the deceased was such that fair and reasonable men might differ with respect to his prudence and propriety under the circumstances, and hence that the question is not one of law for the court, but of fact for the jury. This court has never decided that it was negligence per se for a passenger in a street car to ride upon the platform. On the contrary, it has held that the question of negligence in such a case is for the jury. *Nolan v. Railroad Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *Vail v. Railroad Co.*, 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626; *Graham v. Railway*

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Co., 149 N. Y. 336, 43 N. E. 917; *Gray v. Railroad Co.*, 61 Hun, 212, 15 N. Y. Supp. 927; *Herd v. Railroad Co.*, 20 N. Y. Supp. 346, affirmed 142 N. Y. 626, 37 N. E. 565. Nor has this court ever held that it was contributory negligence, as matter of law, for a passenger to protrude his body slightly beyond the side of a street car, but it has held that the conduct of the passenger in such cases, whether negligent or otherwise, is a question for the jury. *Francis v. Steam Co.*, 114 N. Y. 381, 21 N. E. 988; *Connolly v. Ice Co.*, 114 N. Y. 104, 21 N. E. 101, 11 Am. St. Rep. 617; *Hassen v. Railroad Co.*, 34 App. Div. 71, 53 N. Y. Supp. 1069; *Tucker v. Railway Co.*, 53 App. Div. 571, 65 N. Y. Supp. 989; *Brown v. Railroad Co.*, 42 App. Div. 548, 56 N. Y. Supp. 672.

It appears that the car in which the deceased was riding was an open one, except that the sides for a considerable space upwards from the floor were guarded by strong wire screens, and it is argued that the presence of the screens gave notice to the deceased of the danger from trees or other obstructions. It would seem to be clear that such a proposition cannot be affirmed as a matter of law. At most it was but a circumstance for the consideration of the jury. It would be an extreme and unwarranted view of the case to hold that a stranger in the city, as the deceased was, on entering the car, was bound to notice the plan upon which it was constructed, and to divine from that the existence of trees or other obstacles so close to the track as to endanger his safety in case he protruded his head beyond the side of the car to the extent of four inches. Even if the car had been actually constructed with any such view it is impossible to perceive how the deceased could have known it without imputing to him a degree of foresight and mental acumen far beyond the capacity of the ordinary man.

The learned counsel for the defendant has cited several cases in support of his contention that the deceased was guilty of contributory negligence as matter of law. Two of the cases cited require a brief notice, as the headnote in one of them is somewhat misleading. In *Clark v. Railroad Co.*, 36 N. Y. 135, 93 Am. Dec. 495, the action was by a passenger on a street railroad to recover damages resulting from an injury while he was riding on the platform. The learned judge who gave the opinion in that case discussed the question of negligence on the part of the passenger. But it appears that the case was submitted to the jury, and that the plaintiff recovered a verdict, which was affirmed in this court. What was said in that case on the subject of contributory negligence was not necessary to the decision of the case. It was shown that the conductor of the car collected the fare from the passenger while he was riding on the platform, and this circumstance was held to be an implied assurance on the part of the company that it was a safe place to ride. Substantially the same circumstance is disclosed by the record in the case at bar. It

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was shown without contradiction that the day prior to the accident in question the deceased was a passenger upon the defendant's road, and that while riding on the platform the conductor collected his fare. So I am unable to perceive any principle that the case referred to decides which supports the argument in favor of the defendant. A case in which the plaintiff recovered and the recovery was sustained in this court cannot be said to be an authority to support the decision in the present case. In *Coleman v. Railroad Co.*, 114 N. Y. 609, 21 N. E. 1064, the action was by a passenger in an open car, who left his seat in the car, and went, not upon the platform, but upon the side-step. It was claimed that while upon the step he swung himself outside the line of the car, and that while so doing he came in contact with a column of the elevated railroad. It must be admitted that in that case negligence could be imputed to the passenger with much more reason than in the case at bar, and yet even in that case the question was submitted to the jury, and the plaintiff had a verdict, which was affirmed below, but reversed in this court for an error, committed at the trial in refusing to charge a certain proposition presented by the defendant's counsel. It is significant, however, that no suggestion was made in this court that the case was improperly submitted to the jury. There was no principle decided in either of these cases that sustains the nonsuit in the case at bar. Both cases were submitted to the jury, and in both there was a verdict for the plaintiff. In one of them the judgment was affirmed in this court, and in the other it was reversed, not because it had been improperly submitted to the jury, but for an error in refusing to charge. I think that the question of the defendant's negligence in this case, as well as that of the contributory negligence of the deceased, should have been submitted to the jury, and for these reasons the judgment should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and HAIGHT, LANDON, and CULLEN, JJ., concur with GRAY, J. O'BRIEN, J., reads dissenting opinion. WERNER, J., not sitting.

Judgment affirmed.

FEZLER v. WILLMAR & S. F. RY. CO. (two cases).

(*Supreme Court of Minnesota, Jan. 17, 1902.*)

[88 N. W. Rep. 746.]

A boy 10 years and 4 months old entered upon appellant's right of way, which was not fenced, and walked on the railroad track. Seeing a freight train approach, he stepped aside, and when about half of it had passed ran along beside it, in a path at the ends of the ties, trying to keep up with the train. He stubbed his foot against one of the ties and fell, one foot being caught under the car wheel, causing the injury sued for: *held*:

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Injury to Boy on Track—Liability as Affected by Failure to Fence.*

That the absence of the fence was not the proximate cause of the injury.

Same—Contributory Negligence in Running beside Train.

That the boy was guilty of contributory negligence.

(Syllabus by the Court.)

Appeal from district court, Lyon county; B. F. Webber, Judge.

Actions by Philip W. Fezler against the Willmar & Sioux Falls Railway Company, and by Philip W. Fezler, as father of Leo Fezler, against the same defendant. Verdict for plaintiff. From an order denying a judgment notwithstanding the verdict, defendant appeals. Reversed.

C. Wellington, for appellant.

F. D. Larrabee, for respondent.

LEWIS, J. These actions were brought by the father of Leo Fezler; one for the purpose of recovering damages on account of the loss of the boy's services, and the other for the son's injuries sustained by the alleged negligence of defendant in failing to fence its right of way. The case comes to this court upon appeal from an order denying defendant's motion for judgment in its favor notwithstanding the verdict. There is no dispute about the facts. The boy was about 10 years and 4 months of age, residing with his parents at the village of Russell on defendant's railroad line. In the afternoon of December 16, 1900, with the consent of his mother, his father being absent from home, Leo, in company with his younger brother, seven years of age, went rabbit hunting in the country immediately surrounding the village, for which purpose he took with him three greyhounds. A river runs in the rear of plaintiff's home, which, at some short distance from the village, passes under the railroad bridge, and the boy started down this river on the ice, leading the dogs with strings. After passing under the railroad into the country, he wanted to return home. On the opposite side of the track was a highway running back to the village, but it does not definitely appear how far it was from the track. However, Leo got upon the railroad track, the same being unfenced, and, still leading his dogs, and followed by his brother, was walking between the rails toward the village, but, seeing a train approach, he stepped off the track, at the same time releasing his dogs, who ran home. It was a freight train, and when about a half of it had passed him he stepped into a path running along close to the ends of the ties, and, as he says, commenced to run, trying to see if he could keep up with the train. After running a short distance, he says, his foot struck against the end of a tie, and he fell, and that in some way his foot was caught beneath the wheels, causing the injuries sued

*As to the liability for injuries to children as affected by failure to fence track, see *Nickolson v. Northern Pac. Ry. Co.* (Minn.), 18 Am. & Eng. R. Cas., N. S., 682, and extensive note, 686 et seq.

for. According to the record and the child's own testimony he had lived in Russell with his parents for about three years. Their home was not very far from the depot, in plain sight of the railroad track and passing trains. During those three years he had attended school, pursuing the ordinary studies, such as reading, writing, spelling, and arithmetic. So far as appears, he was a boy of average intelligence, accustomed to go about by himself, and frequently having the charge of a younger brother; in the habit of going into the woods on hunting expeditions, with dogs, for the purpose of catching rabbits. He knew the nature of fences, including those of barbed-wire, and had had experience in crawling through and under them. He had been warned by his father of the danger of railroad trains, and cautioned to "keep away from the cars." Defendant admits the lack of a fence along the track where the boy approached it. Upon this state of facts, the trial court submitted to the jury two questions: First, whether the absence of the statutory fence was the proximate cause of the injury; second, whether the boy was guilty of contributory negligence. And we are asked to consider these two propositions as questions of law upon the admitted facts.

In the case of *Rose v. Railway Co.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472, it was held that the statute requiring railway companies to fence their roads was not exclusively designed to prevent domestic animals from straying upon their tracks, but was applicable in cases where young children, non sui juris, stray upon tracks and receive injuries in consequence of the failure to construct a fence. In the opinion we find the following language: "If, as is conceded, it was designed to prevent dumb beasts from straying upon the track, how can we assume that it was not also designed to prevent infants, who are equally irresponsible, from straying there? As has been said, in one case a fence may be a very formidable obstruction to a child's going upon a railroad company's right of way; it may prevent his going there entirely; and, if it would, we do not think we have any right to say that his protection was not within the purview of the statute. In view of the kind of fence which the statute permits to be built, it may be in most cases a question whether the existence of such a fence would have prevented the child from straying upon the track, and hence whether the failure of the railway company to build it was the proximate cause of the injury. But that is a matter of proof on the trial." While the court there held the statute to include human beings, it is evident that in so extending its meaning it accepted as within its provisions only those who by immature age and lack of judgment might, in point of irresponsibility, be classed with the dumb beasts. So that in determining the question of whether or not the absence of the fence in this case was the proximate cause of the injury the test is: Had the statutory fence existed, would it prob-

ably have prevented this boy from getting upon defendant's track? His movements are not to be determined alone by his age, for it is a matter of common knowledge that some children have more alertness at four or five than others at eight or ten years of age. But the actions of this boy are to be judged by his age and powers of discretion as disclosed by the record. It does not appear that he was straying away from home, without any fixed purpose governing his actions. He was not running about here and there, as fancy dictated, but had planned a trip into the country for a specific purpose, and he had a certain definite route in mind both in going and returning. According to his own statement, he returned by the railroad track because it was the shorter and better way back to the village. Can it be said, then, that this boy, guiding his movements by an intelligently planned purpose, was within the class of infants contemplated? The fence which, under the law, defendant was permitted to build, might consist of two barbed wires and one smooth wire; the top wires to be not more than 52 inches nor less than 48 inches high, and the bottom wire to be not less than 16 inches from the ground. Or it might be made of four smooth wires, the top wire to be not more than 56 inches nor less than 48 inches high, and the bottom wire not less than 16 nor more than 20 inches from the ground. If it was the boy's premeditated purpose to return to the village by the shorter and better route along the railroad track, a fence of this character would offer very little, if any, obstruction to him. Accustomed to rely upon himself, knowing the nature of such fence, acting upon his own judgment, he would either crawl through or under it. Again, it seems very clear to us that the boy was guilty of contributory negligence. In the first place, if he was *sui juris*, he was a trespasser in being upon the tracks; and it appears from what has been said in reference to his education and general intelligence that he was acting as a reasonable being, and knew what he was about, when he went upon defendant's track. It is no answer to say that he did what many other boys would have done under similar circumstances. Nor is it any answer to say that he did not expect or anticipate any accident would befall him when running along beside the train. Such consequences are never anticipated by people who take risks. The fact that the boy acted in a thoughtless or careless manner in running beside the track in an endeavor to keep up with the train is not evidence sufficient to show that he was *non sui juris*. In this respect we do not think this action differs substantially from that of *Twist v. Railroad Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626, where a boy of 10 years and 4 months of age was injured by having his foot caught in a turntable. It was said in that case that the fact that a child may not have the mature judgment of an adult will not excuse him from exercising the degree of judgment and discretion which he possesses, or for disregarding the

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warnings and orders of his seniors, and heedlessly rushing into known danger; and that, while the boy may not have realized the danger as fully as an adult, yet he knew that he had no right to go upon the turntable; that his father had warned him it was dangerous, and he himself knew it to be so. The opinion closes with this language: "While we are not disposed to adopt a severe rule by which to judge the conduct of childhood, yet such conduct on the part of an intelligent boy of nearly 10½ years amounts to contributory negligence, and cannot be excused on the plea of childish instincts." So here the boy knew by his observations and experience, as well as by warning and admonition, that the railroad track was a dangerous place, and that trains were dangerous; and while it may have been a childish impulse that prompted him to run along beside the train in an attempt to keep up with it, that fact cannot excuse him from the responsibility of being in so perilous a place.

The order is reversed, and judgment ordered for defendant.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err., v. EMIL REISS et al.

(Argued November 27, December 2, 3, 1901. Decided January 13, 1902.)

[22 Sup. Ct. Rep. 253.]

Liability for Loss of Goods Unloaded by Connecting Carrier on Its Pier, Prior to Notice to Succeeding Carrier—Awaiting Further Conveyance.

Cotton unloaded by a connecting carrier at its pier without giving any notice of its arrival to the succeeding carrier does not await further conveyance, within the meaning of a clause in the bill of lading relieving the carrier from liability other than as a warehouseman "while the said property awaits further conveyance."

Bills of Lading—Construction.

A hidden or obscure meaning will not be sought for a particular clause of a bill of lading because its obvious meaning provides for contingencies which are also provided for by other clauses of the same bill.

In Error to the United States Circuit Court of Appeals for the Second Circuit of review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York entered upon a directed verdict for plaintiffs in an action to recover the value of cotton destroyed by fire. Affirmed.

See same case below, 39 C. C. A. 149, 98 Fed. 533.

Statement by MR. JUSTICE PECKHAM:

This action was brought in the circuit court of the United States for the southern district of New York by the plaintiffs, who are defendants in error here, and are residents of Liverpool, England, to recover the value of some 200 bales of cotton destroyed by fire at Westwego, Louisiana, opposite the

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city of New Orleans, November 12, 1894, at a pier on the west bank of the Mississippi river, owned by the plaintiff in error. This is the same fire which is mentioned in *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. Ed. 725, 19 Sup. Ct. Rep. 421. Upon the first trial the court directed a verdict in favor of the defendant, but the judgment entered thereon was reversed by the circuit court of appeals (39 C. C. A. 149, 98 Fed. 533), and a new trial granted. Upon the second trial the court, following the opinion of the circuit court of appeals, directed a verdict for the plaintiffs for the value of the cotton, and the judgment entered upon that verdict having been affirmed by the circuit court of appeals on the authority of its former opinion (39 C. C. A. 679, 99 Fed. 1006), the railway company brings the case here by writ of error. The defense of the company is based upon a clause in the bill of lading which will be set out hereafter.

The cotton had been shipped at Temple, in the state of Texas, on the Missouri, Kansas, & Texas Railway, to be carried over its road and the defendant's road to New Orleans, and from that port to Bremen. It arrived at New Orleans at the pier of the railway company November 6, 1894. One hundred and sixty bales were unloaded on November 7, and the balance soon thereafter, but on what day is not certain. One hundred and twenty bales were unloaded and placed at one point, and two different lots of forty bales each were deposited at other points, thus leaving the cotton at three different points on the pier of the railway company. At this time the pier was quite full, there being over 20,000 bales deposited upon it and some 8,000 bales in cars waiting to be unloaded. The pier was built, owned, and in the exclusive possession of the railway company. The bill of lading which was issued at Temple, in the state of Texas, by the Missouri, Kansas, & Texas Railway, expressed on its face to be on behalf of that company, and also the defendant company and the steamship company. It was an elaborate document, and purported to be "an export bill of lading approved by the permanent committee on uniform bill of lading." It acknowledged the receipt of the cotton consigned as marked, and to be carried to the port of New Orleans, Louisiana, and thence by the Elder, Dempster, & Company's steamship line to the port of Bremen, Germany. It had conditions which are stated to be:

"(1) With respect to the service until delivery at the port of New Orleans, Louisiana."

"(2) With respect to the service after delivery at the port of New Orleans, Louisiana."

There are 12 clauses relating to the service until delivery and 15 clauses relating specifically to the service after delivery at the port of New Orleans. Those clauses which are specifically referred to in this case are numbered 3, 11, and 12 in the bill of lading. They read as follows:

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“3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . .”

“11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance; and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

“12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien due and payable by the steamship company.”

The usual method of handling cotton upon its arrival at the pier of the company at Westwego, Louisiana, is stated, as both counsel in this case agree, with substantial accuracy in *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 352, 43 L. Ed. 725, 727, 19 Sup. Ct. Rep. 421, 423, as follows:

“The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company, and a waybill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular waybill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego, a ‘skeleton’ would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the waybill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a ‘check clerk,’ and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship

company came and took it way. After the checking of the cotton in this way to ascertain that the amounts, marks, and general information of the waybill were correct, the skeleton would be transmitted to the general office of the Texas & Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a 'transfer sheet' that contained substantially the information contained in the waybill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and, by the aid of the transfers returned from the steamship agents, point out to the master or mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel, or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready."

At the time of the fire it is conceded that no transfer or skeleton sheets had been sent to the steamship company, or notice given it of the arrival of this cotton at the pier of the railway company.

Messrs. Rush Taggart and Arthur H. Masten for plaintiff in error.

Messrs. George Richards, Frederick E. Mygat, and Treadwell Cleveland for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

In this case there had been no delivery of the cotton by the railway company prior to its destruction by fire. The cotton had arrived at the pier of the railway company, but no notification of its arrival had been given to the steamship company, nor was it in fact in the possession of, nor had it been delivered to, the latter company. It was still under the absolute control and in the possession of the railway company, and nothing had been done to terminate its common-law liability at the time the fire occurred.

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In *Myrick v. Michigan C. R. Co.*, 107 U. S. 102, 27 L. Ed. 325, 1 Sup. Ct. Rep. 425, Mr. Justice Field, delivering the opinion of the court, and speaking of the duty of a connecting carrier, at page 106, L. Ed. p. 326, Sup. Ct. Rep. p. 429, said:

“If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,—the next carrier on the route beyond.”

As between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier or notify him of their arrival, and the former is not relieved of responsibility by unloading the goods at the end of his route, and storing them in his warehouse, without delivery or notice to or any attempt to deliver to his successor. *McDonald v. Western R. Corp.* 34 N. Y. 497; *Congdon v. Marquette, H. & O. R. Co.*, 55 Mich. 218, 21 N. W. 321. In the latter case it is held that the duty of the connecting carrier is not discharged until it has been imposed upon the succeeding carrier; and this is not done until there is delivery of the goods, or at least until there is such a notification to the succeeding carrier as according to the course of business is equivalent to a tender of delivery.

Within these cases it cannot be claimed that this defendant had either actually or constructively delivered the cotton to the steamship company at the time of the fire. The defendant is compelled, therefore, to have recourse to the clauses in the bill of lading in its attempt to rid itself of liability consequent upon the destruction of the cotton by a fire while at its pier and in its possession. The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common-law liabilities; and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673, 679, 24 L. Ed. 563, 565, “both reasonable and just that its own words should be construed most strongly against itself.” To the same effect is *London Assur. Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 159, 42 L. Ed. 113, 120, 17 Sup. Ct. Rep. 785, and *The Queen of the Pacific*, 180 U. S. 49, 52, 45 L. Ed. 419, 420, 21 Sup. Ct. Rep. 278.

We come then to an examination of the bill of lading for the purpose of determining whether the railway company has been exempted from liability by any of its provisions.

We do not understand it is contended that either clause 3 or 12 applies, because, as is conceded, there was never any notification given the steamship company of the arrival of this cotton. Without that notification counsel does not contend that either of those clauses applies. The argument at the bar was devoted to maintaining the proposition that the railway company was exempted under clause 11, and the other clauses in the bill of lading were referred to for the purpose of giving point to that contention. It was urged at the bar that under the 11th clause the question of notification was immaterial, because, although a notification had not been given, yet the cotton, upon its arrival at the pier and after it had been unloaded from the cars, "awaited further conveyance," within the meaning of the 11th clause, and while awaiting further conveyance the carrier was by the express terms of that clause relieved from liability otherwise than as warehouseman. In other words, that the carrier upon the arrival of the cotton and unloading it at the pier, and without giving any notification of its arrival, ceased to be a carrier, and became liable only for negligence which might cause the loss of the property, and there being no negligence proved in this case, the carrier was not liable.

It was argued that clauses 3 and 12 were intended to cover such a case as would have existed in the one now before us had notice been given to the steamship company of the arrival of the cotton at Westwego, such notice being understood by the steamship company as a request to come and take away the cotton; and in holding, as the court below did, that notification was necessary before the 11th clause could apply, that clause was thereby deprived of any separate effect, because after notification the 3d or the 12th clause would exempt the carrier, and therefore some further or other meaning must be given the 11th clause, so that it may operate in a case where no other clause would be available.

Upon this subject Circuit Judge Shipman, in the court below, said:

"It is not claimed that the facts bring the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property 'is ready for delivery' to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. *McKinney v. Jewett*, 90 N. Y. 267. It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at Westwego has been accomplished, and it has been stacked on the wharf, and 'is awaiting further action in the way of notification and advice to the succeeding carrier,' it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law; and doubtless they

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were at liberty to make a contract of limitation which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause 'no carrier shall be liable for delay,' when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term 'awaiting further conveyance' literally means 'awaiting the time when the next carrier shall take the property in hand,' it seem improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given."

We agree with the views of the court below, as expressed by Judge Shipman. We do not think that the property can be said to await further conveyance the moment it is dragged upon the pier of the railway company and unloaded from its cars, and before any notification is given to the steamship company that the cotton has arrived and awaits transportation by ship. In one sense it might be said that property awaited further conveyance if anywhere along the line of the railway company an engine of the train should break down, and the train be brought to a standstill for several hours, awaiting a new engine. In such case the cotton would not have arrived at the termination of the road of the railway company, and in one sense it would certainly be awaiting further conveyance, because it had not arrived at the end of the route; but no one would suppose for a moment that during the time that the train was thus at a standstill the 11th clause of the bill of lading would be applicable. No court would give such a construction to the clause as would exempt the company under the circumstances stated.

We are then to look for some fair and reasonable meaning to be given to the term, and we think that the court below has given such meaning to it. It cannot reasonably be said that within the meaning of that clause the property awaits further

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conveyance the moment it has been unloaded from the cars onto the pier of the defendant. As is stated by the circuit court, at that time the property awaits the further action of the defendant, and does not await further conveyance until it has become the duty of the succeeding carrier to take it further, after notification that it has arrived and awaits delivery to it. After that time it may be said to await further conveyance, but up to that time it awaits the further action of the railway company.

This meaning of the clause is not altered even if the language used in other clauses might also grant exemption upon the same facts. We are not for that reason bound to find some other and different meaning for the 11th clause than such as we think is obvious and plain upon its face. The various propositions mentioned in these different clauses and the many contingencies provided for therein under which the company might claim exemption render it not surprising that the same ground of exemption should possibly be covered by more than one provision in the bill, or that, in other words, the defendant should upon the same facts be exempt under more than one of its various and perhaps somewhat indefinite clauses. No rule of construction binds us to find some hidden or obscure meaning for a particular clause, because the simple and plain one which is seen upon its face provides for contingencies which may be also provided for in another clause of the same bill.

Reference was made in the opinion of the court below, and also upon the argument in this court, to the case of *McKinney v. Jewett*, 90 N. Y. 267, in relation to a delivery of goods at the termination of the carriage, where the meaning of the phrase "awaiting delivery" was under consideration, the court holding that the phrase implied not only the arrival of the goods, but the completion of whatever on the part of the carrier is necessary to be done to leave the risk of further delay upon the consignee; that the goods were "awaiting delivery" only after the duty of the common carrier is done, and he is entitled to remain passive awaiting the action of the consignee.

It was objected on the argument at the bar that the case was not in point because of the distinction between awaiting delivery and awaiting carriage, and it is urged that this difference is substantial; that conveyance and delivery are different acts and relate to different parts of the service; that there could be no delivery to the consignee under the New York case until there had been notice in some form to the consignee, while the element of notice had no connection with the act of conveyance of the cotton, which might be entirely complete regardless of notice. The two cases differ in that the New York case, as counsel says, relates to a delivery at the end of the route, and the case at bar relates to goods awaiting conveyance by a connecting carrier; but in both the

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question arises as to the meaning of the term "await," and the New York case holds that goods do not await delivery within the meaning of that term as used in the bill of lading, until notice of their arrival has been given the consignee; and it seems to us that the same reasoning holds here, and that goods are not awaiting further conveyance by a connecting carrier until the preceding carrier has given him notice of their existence at the place where further conveyance is to be continued. We do not dispute that there is a distinction between the position of goods awaiting delivery and those awaiting further conveyance; and the fact of such distinction is recognized in *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318, 327, 21 L. Ed. 297, 302, and it is therein stated that there is a clear distinction between property in a state to be delivered free to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it might be said to be awaiting delivery; in the latter to be awaiting transportation. But the analogy between goods awaiting delivery at the end of the route and goods awaiting further conveyance by a connecting carrier, so far as the requisite of notice in each case is concerned, we think exists, and should be recognized.

There having been in this case no notification to the steamship company, without which clauses 3 and 12 do not apply, and we being of the opinion that clause 11 has also no application without notification to the steamship company, it follows that the exemption claimed under the bill of lading is not sustained; that the defendant at the time of the fire was under obligation as a common carrier, and liable for the destruction of the cotton, and that the judgment in favor of the plaintiff below was right, and must be affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err., v. JOHN R. CALLENDER *et al.*

(Argued December 3, 1901. Decided January 13, 1902.)

[22 Sup. Ct. Rep. 257.]

Liability for Loss by Fire of Goods Ready for Delivery—Specific and General Clauses Limiting Liability.

A carrier remains liable as at common law for a loss of cotton by fire while in its possession, although it was "ready for delivery" to the next carrier, or was awaiting further conveyance within the meaning of clauses in the bill of lading modifying its common-law liability for the loss of goods under such circumstances, where such bill of lading also declares that "cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," since this specific clause takes effect to the exclusion of general clauses containing matters of general exemption.

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Liability for Loss of Goods Deposited on Company's Pier for Delivery to Succeeding Carrier.*

A railroad company does not, by unloading cotton on a pier under its sole and absolute control and possession and notifying a steamship company, the succeeding carrier, of its arrival, deliver the cotton "to the steamship company or on the steamship pier," within the meaning of a clause in the bill of lading providing that its liability shall terminate on such delivery, even assuming that such pier was the place agreed upon between the railroad and steamship companies to make delivery of cotton to be thereafter carried by the steamship company, where the railroad company still continues to retain full control of the cotton, and could, under certain contingencies, and at any time before delivery to the steamship, send the cotton by another steamer, and by agreement between the parties the steamship company was not to take the property until it sent a steamer to the pier for that purpose.

In Error to the Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York entered upon a directed verdict in favor of plaintiff in an action to recover the value of cotton destroyed by fire. Affirmed.

See same case below, 39 C. C. A. 154, 98 Fed. 538.

The facts are stated in the opinion.

Messrs. Arthur H. Masten and Rush Taggart for plaintiff in error.

Messrs. Treadwell Cleveland, George Richards, and Frederick E. Mygatt for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court:

This action was brought by the defendants in error, who are aliens, in the circuit court of the United States for the southern district of New York, to recover the value of 187 bales of cotton destroyed in the same fire at Westwego, Louisiana, November 12, 1894, mentioned in the immediately preceding case. As in that case, the defense here is based upon certain clauses of the bill of lading providing exemption from common-law liability in the contingencies mentioned. There was a verdict for the plaintiffs by the direction of the court, and the judgment entered thereon having been affirmed in the circuit court of appeals (39 C. C. A. 154, 98 Fed. 538), the railway company has brought the case here by writ of error.

The facts as to the manner of doing business at Westwego are the same as those stated in the foregoing case, and also in the Clayton Case, 173 U. S. 348, 43 L. Ed. 725, 19 Sup. Ct. Rep. 421. The cotton arrived at Westwego between October 17 and 29, and had been so placed on the pier that it was only necessary for the steamship company to send a ship there and take the cotton when pointed out to its master or other officer. In this case there had been sent a notification to the

*See *Courteen v. Kanawha Dispatch* (Wis.), 21 Am. & Eng. R. Cas., N. S., 425, and foot-note.

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steamship company, by means of the "transfer sheets" mentioned in the statement of facts in the other case, of the arrival of the cotton as early as November 2, for most of it, and for a few bales as late as November 10. After the evidence was in, the defendant requested to go to the jury upon the question whether the cotton was awaiting further conveyance at the time of its destruction, and also upon the question of whether the cotton had been delivered to the steamship company, and also upon the whole case. The request was refused. The clauses of the bill of lading to which reference is made are the following:

"1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; . . . or for loss or damage to property of any kind at any place occurring by fire, or from any cause except the negligence of the carrier."

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . ."

"4. . . . Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire. . . ."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

The claim of the railway company is that the language of the 4th clause in the bill of lading, which excepts cotton from any clause therein on the subject of fire, and which renders the carrier liable as at common law for loss or damage by fire, is limited in its application to those clauses in the bill of lading which speak of fire, and that the common-law liability of the company existing under the 4th clause is subject to the provisions of the other clauses mentioned in the bill, which provide for exemption or reduction of liability under the facts stated in them. In other words, that if the company might otherwise be liable for the loss of cotton by fire by reason of the 4th clause, yet, if at the time of the loss the property was

ready for delivery, although not delivered, to the next carrier, as provided for in clause 3, or if it awaited further conveyance, though not actually delivered to the connecting carrier, as stated in clause 11, that then it would be exempted under the 3d or its liability reduced under the 11th clause of the bill of lading, and the plaintiff could not therefore recover, on the proof in this case. Of course if under the 12th clause the property had actually been delivered to the succeeding carrier, its destruction by fire thereafter would not render the preceding carrier liable for that loss.

The measure of the common-law liability between connecting carriers is stated in the opinion in the preceding case and the cases therein referred to, and need not be here repeated.

Now what is the true construction of the 4th clause? In relation to that it was stated by Judge Shipman, in delivering the opinion of the circuit court of appeals herein, as follows:

“The principal question in the case is upon the proper construction of the sentence in clause 4 in relation to the liability of the defendant for loss of cotton by fire. The bill of lading was prepared for a contract in regard to property of any kind, and in clause 1 the carrier was exempted from liability from loss by fire except through his negligence. The part of the sentence in clause 4, ‘Cotton is excepted from any clause herein on the subject of fire,’ probably refers only to clauses wherein fire is mentioned; but the concluding part of the sentence, ‘and the carrier shall be liable as at common law for loss or damage of cotton by fire,’ has a wider sweep, and means that the carrier, notwithstanding limitations of its common-law liability which are provided in the bill of lading, retains such liability in regard to damage to cotton by fire. The clause as a whole intended to leave and did leave unaltered the implied liability of the carrier for loss to cotton by fire. The limitations which the parties did permit were contained in clauses 3 and 11, which said that the carrier should not be liable for damage after a readiness to deliver, or otherwise than as a warehouseman after the property waited further conveyance. Whatever may be the extent of these limitations, they were to a certain degree modifications of the common-law liability of the first carrier, but its liability at common law for loss to the cotton by fire remained intact. The request of the defendant to go to the jury upon the question of delivery of the cotton was properly refused. There was no evidence of a delivery. The cotton was never in the actual or constructive possession of either of the steamship companies, and neither was ready to take it from the defendant’s possession; and therefore clause 12 has no bearing upon the question of the defendant’s liability.”

We think this view of the circuit court of appeals is the correct one, and that under the wording of the 4th clause in the bill of lading the defendant was properly held liable. The first part of that clause in terms takes cotton out of any clause

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on the subject of fire, and as if such language might possibly render it doubtful as to what the status of cotton would be by merely excepting it from any clause on the subject of fire contained in the bill of lading, it is further provided that "the carrier shall be liable as at common law for loss or damage of cotton by fire." The whole is a special and specific provision which applies to cotton alone and to the loss of cotton by fire. The other provisions apply generally to all property, whatever its character and wherever taken. In other words, these other clauses are of a general nature, while the 4th clause refers to cotton alone, and to the specific cause of the loss, viz., by fire. We are of opinion that the specific clause takes effect to the exclusion of the general clauses containing matters of general exemption, and that therefore the carrier remains liable as at common law for a loss of cotton by fire while in the possession of the carrier, although it was ready for delivery to the next carrier within the meaning of the 3d clause, or was awaiting further conveyance within the meaning of the 11th clause; but that if it had been actually delivered before the loss, the railway company would not have been responsible therefor. The defendant's claim, if allowed, would leave the shipper without recourse for loss by fire after the notification had been given to the steamship company and before the delivery of the cotton had been made to it, because the railway company would be under no liability for the loss of the cotton by fire, excepting by reason of its own negligence, and the insurance of the cotton, while in the possession of the steamship company, would not attach, and so the shipper would be without any adequate protection during that time. True, he might obtain special insurance during this intermediate period, but it would add to the expense of the transit which under the terms of the bill he would naturally not feel called upon to make, and it would be inconvenient and troublesome to do it, and the court ought not to unduly limit the plain language of the clause for the purpose of thereby enabling the company to escape a liability cast upon it by the common law, and which it voluntarily assumed.

As cotton was the subject of the special provision, its language should be given full sway, and should not be curtailed by other provisions in other clauses of a general nature referring to all kinds of property.

We are also of opinion that there was nothing to go to the jury upon the question of a delivery of this cotton to the steamship company under the 12th clause of the bill of lading. It may be assumed that the pier of the railway company was the place understood and agreed upon between that company and the steamship company to make delivery, when it was made, of the cotton to be thereafter carried by the steamship company; but upon the uncontradicted evidence in this case we are of opinion that the simple arrival of the cotton at the pier, and notice thereof given to the steamship company by

means of the "transfer sheets" spoken of in the other case, did not in and of itself amount to a delivery of the cotton to the steamship company, constructive or otherwise. Nor was it a delivery on the steamship's pier, as between the shipper and the railway company, within the language of clause 12, and for the reasons herein stated the notice to the steamship company did not relieve the railway carrier from liability.

The uncontradicted evidence shows that the cotton came to the railway pier under these circumstances: The pier was built by the railway company, and was in its sole and absolute control and possession. Not a bale of cotton could be taken from it without the action of that company; its own watchmen were in charge of the pier at all times, and when a steamship came to the pier it was only under a permit or an order from an officer of the railway company that the cotton was taken. It was pointed out by the servants of the railway company, and, within the custom of the port of New Orleans, it had to be brought within the reach of the ship's tackle before the ship was called upon to take it. The expression "ship's tackle" means "where the ship's ropes can get onto it so that the ship's winches can pull the cotton in." The custom was that after a steamship company returned the transfer sheets which had been sent it by the railway company, an order was made out by the railway officials on the Westwego office of the defendant to deliver to the steamship company's agents such cotton as was ordered. It does not appear that any such order was given. Prior to the time of the arrival of the vessel which was to take the cotton and the arrival of the stevedores, the steamship company had no charge of any of the cotton on the pier. There was no particular spot on the pier at which; if cotton were there deposited, it was understood between defendant and the steamship companies to have been deposited in the care, control, or possession of any of such companies; but, on the contrary, the whole pier was covered by cotton destined indiscriminately for transportation to different European ports by different line of steamers, not one of which could take a bale of cotton away without the order of the railway company.

Before the ship took the cotton it gave a mate's receipt for it, although sometimes the receipt would not come as soon as that, and the cotton would be delivered before the receipt was given. The cotton which came in on the cars of the defendant was placed all along the pier, and that which was destined for any particular company had to be pointed out and selected from a large mass of cotton on the pier. The railway company had contracts with various steamship companies;—with the West India & Pacific, the French line, the lines for which Miller & Company were agents, the Hamburg-American line, and some others;—and the cotton for all these various lines was unloaded upon this pier of the railway com-

pany, and was distributed all over the wharf, so that when a steamship came to the dock upon which the cotton was, that which was intended for the particular steamship then at the pier would be brought out to it or within reach of its tackle by the railway employees, depending upon where the cotton was, and how far away from the ship; and it was understood between the steamship and railway companies that the railway company would get out the cotton when necessary to do it, and by getting out the cotton was meant dragging it from where it was stored on the wharf out in front or near enough in front to enable the steamship people to get it without having to go around through the bales of cotton.

The connection of the steamship companies with the transportation of the cotton was the subject of special contracts between those companies and the railway company. The initiation would be an agreement between a steamship company and the railway company for a certain charge for freight across the ocean for a stated amount of cotton from New Orleans to Liverpool or Bremen, or whatever other foreign port it might be, and no particular cotton was specified. Having obtained this agreement as to price and number of bales, the railway company would then agree with the shipper in Texas for a through rate from the point in Texas at which the cotton was to be taken to the port abroad, and it would then give a bill of lading such as was given in evidence in this case, providing for the through rate and the liabilities of the various carriers by rail and by sea; but it was only after an arrangement had been made and a contract entered into between the railway and a steamship company that the latter company would send a steamer to the Westwego pier. The evidence is uncontradicted in regard to what the steamship lines had to do under the agreements they had with the defendant; in some cases they were not under any obligation to come to the pier unless the defendant had at least 1,500 or 2,000 bales of cotton ready for them, while in another case the steamship company which had a contract to take 20,000 bales of cotton from the railway company was not to be called on to go to the wharf unless there were at least 500 bales ready to deliver to it, and by the bill of lading the railway company might, under certain contingencies, if it deemed necessary, forward the cotton by some steamer of another line than that mentioned in the bill. The steamship companies took their own time in coming to the Westwego pier for the cotton. If they had no special contract with the railway company, they did not come at all. It was not the case of a regular delivery by the railway company to a connecting carrier at the pier of the latter.

Now upon these facts we regard it as entirely clear that at the time this cotton was lost there had been no delivery, actual or constructive, to the steamship company, so as to divest the defendant of its common-law liability for the loss of this cotton.

Within clause 12 of this bill of lading there was no delivery of the property by the defendant, either to the steamship, her master, agents, or servants, or to the steamship company, or on the steamship company's pier at the port of New Orleans, even upon the assumption that the pier at Westwego was the point agreed upon between the railway and the steamship companies, where the delivery of the cotton was to be made when it was delivered. How can it be said that there was a delivery to this steamship company upon the facts above detailed when, by agreement between the parties, the company was not to take the property until it sent a steamship to the pier for that purpose? Until it was delivered to it at the steamer's side the steamer had neither possession nor control over it. By the bill of lading the defendant could in certain contingencies, and at any time before delivery to the ship, send the cotton by another steamer. Until the ship did come to the pier, there can be no question of actual delivery in this case.

Nor does the notification to the steamship company that there was cotton at the pier awaiting or ready for delivery to it make such notification a constructive delivery of the cotton, and terminate the liability of the railway company. Here was a pier containing thousands of bales of cotton, destined to various European ports, and by various lines of steamers, with a special right to the railway company, mentioned in clause 11, to send the cotton mentioned in any particular bill of lading by a steamer of a line other than the one mentioned in the bill, and no obligation of the steamship company to send for the cotton until there was a quantity of 500 bales in some cases, and in others until there were from 1,500 to 2,000 bales ready for the particular steamer. A notification to a steamship company by means of a "transfer sheet," which was taken to be a notice that there was cotton at the pier ready for delivery to a steamer when it came, did not necessarily take away the right of the railway company to send that cotton by another steamer, and the company which was notified and sent a steamer would have no ground of complaint if, upon the arrival of the steamer at the pier, other cotton consigned to the same port were given it to the same amount. There being only this conditional obligation to send for cotton on the part of the steamship company, and none upon the part of the defendant to at all events deliver the specified cotton to the former, and the steamship company not having sent a ship to the pier, there was no limitation of the defendant's liability wrought by the notification.

Whatever may generally be the effect of a notice to a connecting carrier, upon the question of terminating or altering the liability of a preceding carrier for the goods, it is quite clear that it has no effect in diminishing the liability until actual delivery in a case where the preceding carrier still continues to have full control over the goods and has a choice

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as between connecting carriers, and may, notwithstanding such general notice, deliver the goods under certain circumstances to another carrier for further transportation. Until actual delivery in such case, the preceding carrier is not divested of his liability.

The case of *Pratt v. Grand Trunk R. Co.*, 95 U. S. 43, 24 L. Ed. 336, and the other cases referred to by counsel in his argument at the bar, have no application in the view we take of the facts. The *Pratt Case* was fully commented upon in *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. Ed. 725, 19 Sup. Ct. Rep. 421, in the course of the opinion of the court and it seems to be too clear for argument that the case does not justify an inference that the facts which we have just detailed in regard to this cotton constitute a delivery, either constructive or actual, to the steamship company, or to the pier of that company.

We are therefore of opinion that the court below did not err in directing a verdict for the plaintiffs for the value of the cotton, and the judgment in their favor is affirmed.

BASS' ADM'R v. NORFOLK RY. & LIGHT CO.

(Supreme Court of Appeals of Virginia, Dec. 5, 1901.)

[40 S. E. Rep. 100.]

Street Railways—Crossing Signals.*

A street car company is guilty of negligence if it fails to give proper warning of the approach of its cars to a public crossing.

Same—Speed at Crossings.*

A street car company is guilty of negligence in operating its car at an unusual and excessive speed at a public crossing.

Same—Contributory Negligence—Passing around Car and Stepping on Other Track without Looking.†

Where plaintiff's intestate, who was a stranger in the city, alighted from defendant's street car, and, passing around the rear end thereof, stepped upon the parallel track without looking either way for an approaching car, and was killed by a car coming rapidly from the direction opposite to that in which the car he had just left was going, his failure to look for an approaching car was not contributory negligence per se.

Error to law and chancery court of city of Norfolk.

Action by Bass' administrator against the Norfolk Railway & Light Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Withers & Green, for plaintiff in error.

Richard B. Tunstall, for defendant in error.

BUCHANAN, J. This action was brought to recover damages for the death of the plaintiff's intestate, caused by the

*See 23 Am. & Eng. Enc. Law 1091 et seq.; 7 Rap. & Mack's Dig. 515 et seq.

†See generally, 23 Am. & Eng. Enc. Law 1011 et seq.; 7 Rap. & Mack's Dig. 486 et seq.

alleged negligence of the defendant in running one of its cars at the point where Colonial avenue crosses Olney road, in the city of Norfolk.

The deceased on the evening of his death was a passenger on a west-bound car of the defendant company, returning to his sister's home, on Colonial avenue, south of Olney road. The car was running on the northern track, and when it reached the eastern side of Colonial avenue it was stopped for the purpose of enabling the deceased to alight. He stepped from the car on the north side of its rear platform, walked around the end of the car, which was still standing at the crossing, passed over the narrow space between the northern and southern tracks, going in the direction of his sister's home, and, without looking to the west, had just stepped upon the southern track, when he was struck by an east-bound car and killed. The east-bound car was running very rapidly,—as fast, one witness testifies, as he ever saw a street car run, and so fast, according to the testimony of another witness, that its rapid movement attracted his attention. Its gong sounded four times at the Glennan House, 113 feet west of the point where the deceased was struck, but was not sounded after it reached Colonial avenue, which is 80 feet wide. The speed of the car was not checked—probably increased—as it approached the point where the west-bound car was standing, and it ran 95 feet after it struck the deceased before it was stopped. The distance between the northern and southern tracks is from 4 to 4½ feet. The sides of the cars extend over the wheels, so that when they pass each other on the tracks the distance between them is about 1 foot.

These are the facts as disclosed by the plaintiff's evidence, to which the defendant, offering no evidence of its own, demurred, and upon which the court rendered judgment in its favor.

The defendant denies that the evidence shows that it was guilty of negligence in the management of its car which struck the deceased.

The people of the city have the same right to pass along an intersecting street crossing as the street car has to go across. It was therefore the duty of the defendant not only to give notice or warning of the approach of its car, but as it neared the crossing, where its west-bound car had stopped to let off and take on passengers, to run at such a rate of speed as to have the car under control, and be able to stop it readily.

In *Electric Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839, where the motive power was electricity, it was held that it was gross negligence in a street railway company to so overcrowd and load down its cars with passengers, beyond any reasonable or proper limit, as not to be able to stop them readily as they approach intersecting streets in case it may be necessary to avoid a collision or prevent an accident.

Unless unusual speed is expressly permitted by law,—and it is not claimed that there was any such permission in this case,—the speed of a street car ought to be no greater than is reasonable and consistent with the customary use of the street by the public with safety. Any speed in excess of that rate is at least evidence of negligence. 2 Shear. & R. Neg. §§ 485a, 485b.

Conceding that the defendant gave proper warning or notice of the approach of its car, it is clear that the car was running at an excessive rate of speed, under the facts of this case, when it struck the deceased, and that a jury might have found that the defendant was guilty of negligence in the management of its car at that point; and, if so, upon a demurrer to evidence the court was bound to so hold.

The defendant's main contention is, however, that, even if the court be of opinion that the evidence shows that it was guilty of negligence, still the plaintiff was not entitled to recover, because the failure of his intestate to look for approaching cars before going upon the track of the defendant was negligence, as a matter of law, and bars a recovery.

The authorities are in conflict upon this question; some holding that such failure to look is per se negligence, and others denying it, and holding that it is a question for the jury, upon all facts and circumstances of the case.

It is the duty of a traveler, in approaching a railroad crossing over a highway, to look both ways for approaching trains before attempting to cross the railroad track; and a failure to do so is generally held to be negligence, as a matter of law. *Railway Co. v. Lacy*, 94 Va. 460, 26 S. E. 834; *Kimball v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901; *Railway Co. v. Bryant's Adm'r*, Id. 212, 28 S. E. 183.

The defendant insists that the same rule is applicable in crossing the track of a street railway at a street crossing in a city. This we do not think is true. The cases are quite different. In the first place, the cars of a street railway have not the same right to the use of the tracks over which they travel. The steam railroad is itself a highway, and the company has a property interest in and to its right of way (with us, usually the fee), even where the public have an easement for highway purposes over the same land. A street railway is not a highway. A street railway has no property interest in the street. It has the mere right to use it in common with the public generally. It has no right to use the street for other or different purposes than those for which it was dedicated or condemned, and because its use by the street cars is not a new and independent one, but merely in aid of the identical use for which the street was laid out, the owners of street cars are not required to pay compensation to the abutting landowners for its use. *Reid v. Railway Co.*, 94 Va. 117, 125, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708.

An ordinary railroad company acquires by purchase or con-

demnation a right to run its tracks over the lands crossed by the highway, and so burdens it with an additional servitude. By legislative authority it uses the right thus acquired in the passage of trains at great speed, and to a certain extent, and from the very necessity of the case, the public easement is at such crossing modified.

A street railway company not only has no property interest in the street, but it has no authority or right to run its cars at a rate of speed which will interfere with the customary use of the street by others of the public with safety. Its cars do not (at least they have no right at street crossings to) run at the same high rate of speed as the ordinary railroad trains. Their running is not attended with the same degree of danger, and they can be much more quickly stopped than the trains of an ordinary railroad.

Street cars are for the most part governed by the same rules which govern other vehicles on the streets, and their owners have only an equal right with the traveling public to use the street. To this general rule there are some modifications or exceptions, from the necessity of the situation. For example, a street car is not governed by "the law of the road," as it is sometimes called, since it cannot leave its track and turn aside. But it is settled law that at street crossings it has only the same rights as the traveling public. "The people of the city," said Judge Riely, speaking for the court, in *Electric Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839, "have the same right to pass along an intersecting street on foot or in vehicles as a street car has to go across. * * * Neither has a superior right to the other. * * *"

These considerations furnish a solid foundation why there should be a difference in the degree of care required in such cases. To impose the same obligation upon persons crossing the tracks of a street railway as that which obtains where they cross an ordinary railroad track would be practically to surrender the street to the railway company, and destroy that equality of right which belongs to the traveling public.

Failure to look for approaching street cars by a person about to cross a street railway track, especially at a street crossing, ought not, we think, upon principle, to be held to be negligence, as a matter of law. The authorities upon this question, as before stated, are conflicting; but the conclusion we have reached is sustained by some of the ablest of our text writers, and by many, if not by a majority, of the decided cases.

The rule as to what will constitute contributory negligence, say Shearman and Redfield in discussing this question, "where street cars are concerned, is in some respects quite different from those which are applied to steam railroads running on their own land. * * * Travelers may walk, ride, or drive either across or along the track, just as freely as upon any other

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part of the street, so long as they do not obstruct the cars, or rashly expose themselves to danger. * * * And while, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule; nor is it to be enforced with any such strictness as in cases of an ordinary steam railroad. It is not negligence, as a matter of law, to omit to do so. The question is whether a prudent man, acting prudently, would have thought it unnecessary to do so." See *Robbins v. Railway Co.*, 165 Mass. 30, 36, 42 N. E. 334; *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440; *Shea v. Railway Co.*, 50 Minn. 395, 52 N. W. 902; *Railway Co. v. Block*, 55 N. J. Law, 605, 610, 27 Atl. 1067, 22 L. R. A. 374; *Railway Co. v. Robinson* (Ill.) 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87; *Railway Co. v. Snell* (Ohio) 43 N. E. 207, 32 L. R. A. 276; *Smith v. Trunk Line* (Wash.) 51 Pac. 400, 45 L. R. A. 169, 173; *Driscoll v. Railroad Co.* (Cal.) 32 Pac. 588, 590, 33 Am. St. Rep. 203; *Railway Co. v. Bates*, 103 Ga. 333, 30 S. E. 41.

The case of *Traction Co. v. Hildebrand*, 98 Va. 22, 34 S. E. 888, does not, we think, sustain the defendant's contention that the plaintiff's intestate was per se guilty of negligence. The opinion of the court in every case must be read in the light of the facts of that case. The person injured in that case was not at a street crossing, but was traveling along the public highway, in the county, upon which the defendant company had laid its tracks. The declaration averred that she was injured by a car running at a high rate of speed "while she was then and there walking upon the tracks and roadbed of the said defendant company, constructed on such street, road, highway, and avenue, upon which she had just stepped in order to avoid a certain other car of the said defendant company, going in the opposite direction from which the plaintiff was traveling at the time. * * * " The declaration was held bad on demurrer, because, construing the declaration most strongly against the pleader, it was held to mean that the collision which caused the injury was simultaneous with the act of the plaintiff in stepping upon the track.

In this case the defendant had stopped its car at the crossing for the plaintiff's intestate to get off. That car obstructed the view of the approaching car to a greater or less degree. The deceased had the right to presume that the defendant would not only give proper signals of the approach of its car, but would not propel it at an excessive rate of speed, especially at a point where it had stopped its car to let off persons, some of whom it might reasonably expect would have to cross its track in order to get to their destination. The evidence does not show that the deceased, who was a stranger in the city, had knowledge of the manner in which the defendant ran its cars at that point, or that there was an east-bound car to pass over this crossing at the very time passengers were being discharged from the west-bound car.

Mobile & O. R. Co. v. Coerver

Whether or not the plaintiff's intestate, under all the facts and circumstances of this case, was guilty of contributory negligence, is a question about which reasonably fair minded men might differ. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided by the court. It was therefore a question for the jury. *Carrington v. Ficklin's Ex'rs*, 32 Grat. 670, 676, 677; *Kimball v. Friend's Adm'r*, 95 Va. 125, 140, 27 S. E. 901. And, since the jury might have found for the plaintiff on the question of the contributory negligence of the plaintiff's intestate, on the defendant's demurrer to the evidence the court must so find.

The judgment complained of must therefore be reversed and set aside, and this court will give such judgment as the court of law and chancery ought to have given.

Reversed.

MOBILE & O. R. CO. v. COERVER.

(Circuit Court of Appeals, Seventh Circuit, January 7, 1902.)

[112 Fed. Rep. 489.]

Railroads—Backing Train—Brakeman on Rear Car—Charge—Negligence.

Plaintiff's intestate was killed, while driving across a railroad track, by a freight train backing against his team. The evidence was conflicting as to whether the brakeman was on the rear car, or on the car next to it and just stepping onto the rear car, when deceased was first seen. The court instructed that it was the absolute duty of the railroad company to have had a brakeman on the rear car; that, if there was no brakeman stationed on such car, defendant was guilty of negligence; and that it was also guilty if the brakeman saw deceased approach the train and in a position of danger and failed to signal the engineer, if the train could have been checked so as to have avoided the danger: *held*, that the instruction was erroneous, as making the defendant liable if the brakeman was not on the rear car.

Same—Signals—Backing Train.

Plaintiff's intestate was killed, while driving across a railroad track, by a backing freight train. The testimony was that, when the train first came in sight, the horse was walking a few feet from the track, and that the brakeman first whistled shrilly and called to deceased to warn him, but, not succeeding in attracting his attention, signaled the engineer just before the car struck the team: *held* error to charge that it was the duty of the brakeman to signal the engineer immediately on the appearance of danger to the person approaching the track.

Same—Contributory Negligence—Evidence—Instruction for Defendant.*

Where a man of mature years and unimpaired faculties, who is familiar with a railroad crossing and its use in the running and switching of trains, while a regular freight train is engaged in its customary switching operations, and with nothing to distract his attention, without stopping or looking, drives at a walk onto the track at such crossing in front of a string of cars attached to the engine

*See *Knopf v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 172, and foot-note.

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moving at a slow rate of speed, and is injured, he is conclusively guilty of contributory negligence, and the court should so instruct the jury.

Grosscup, Circuit Judge, dissents in part.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

The plaintiff in error was the defendant below in an action of trespass on the case brought by Killan Coerver, as administrator, to recover damages for the death of John Coerver, his intestate, alleged to have been caused by the negligence of such defendant in the operation of its train over a street crossing in the city of Waterloo. The trial resulted in a verdict against the defendant and from judgment thereupon this writ of error is prosecuted. The railroad tracks upon which John Coerver was killed extend in a northerly and southern direction upon the western boundary of Waterloo, and comprise three tracks, with the main track on the east, a passing track in the center, and the westernmost is a so-called "house track." The street crossing is known as "Fifth Street," an east and west street of the city or village, 60 feet in width, which extended to the east side of the tracks; thence westward it constituted a main thoroughfare to and from the country and to a cemetery situated about a quarter of a mile west of the tracks. On the south side of Fifth street and east of the tracks are the depot, platform, and freight and coal houses of the railroad. At the time of the accident in question a freight train had arrived, and had detached a caboose and freight cars, which were placed on the main track so that the caboose extended north of a freight car which was being unloaded at the freight house, but the testimony is conflicting whether the caboose extended over the south half of the street, or merely to its south margin; and the engine with six cars attached was backing northwardly on the middle or passing track south of Fifth street to take up cars which were on the same track north of the crossing. The deceased approached the crossing from the east, driving a team of horses at a walk, seated with his son, 13 years of age, on an oil wagon, and in passing over the tracks was struck by the backing cars and killed. The witnesses, both trainmen and bystanders, concur in the testimony that the deceased neither stopped his team nor appeared to hesitate or notice the danger, and the only disputes upon the material facts are in these particulars: Whether the rear brakeman was on the rear car, or merely on the next car ahead and running toward the rear car; whether he could have been observed by the deceased, if the latter had given attention; whether his warning to the deceased was timely; and whether the engine bell was ringing.

Augus Leek, for plaintiff in error.

Seneca M. Taylor, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

The assignment of errors upon this record presents the question whether the verdict is supported by testimony upon the primary issue of negligence on the part of the defendant in the operation of its train, but our conclusion that either or both of the grounds mentioned below are well assigned will render it unnecessary to consider the evidence as a whole upon that serious question. The assignments referred to are: (1) Error in the instruction of negligence per se, if the brakeman was not "stationed on the rear or hindmost car," and if he failed to signal the engineer to stop the train when he observed the danger of the deceased, and the jury are satisfied that injury could have been averted by such signal; and (2) error in the denial of a peremptory instruction of not guilty, based upon proof of contributory negligence on the part of the deceased.

1. The twelfth assignment of error rests upon an instruction to the jury as follows, and an exception thereto duly preserved:

"The court charges you, the jury, that it was the duty of the defendant, on the occasion in question, in backing its train toward Fifth street, to have a brakeman stationed on the rear or hindmost car of said backing train, whose duty it was, immediately on the appearance of danger, to have used reasonable care in signaling the engineer operating such train of such danger, so that said engineer, if he could by the exercise of reasonable care, might check the speed of said train and prevent collision; and if you believe from the evidence that on the occasion of the injury to John Coerver, deceased, which resulted in his death, there was no brakeman stationed on said rear car, or if, on the other hand, you believe from the evidence that there was a brakeman stationed there, and that he saw said deceased approaching the track on which said cars were backing, and that said deceased was in a position of danger, and likely to be run into and injured, unless the speed of said train was checked, and that, notwithstanding said brakeman saw that said deceased was in immediate danger, he failed to give any signal or notice to the engineer operating said train of said deceased's danger until the instant of the collision, and if you further believe from the evidence that, after said brakeman saw said deceased was in danger, he could, by the exercise of reasonable care, have signaled the engineer in time so that the engineer could, by the exercise of reasonable care, have checked the speed of said backing train sufficiently to have avoided the injury to said deceased, then the defendant was guilty of negligence, and if you believe from the evidence that the deceased at the time was using due care for his safety, and was guilty of no fault or negligence contributory to his injury, then you will find the defendant guilty as charged in the declaration."

All the testimony concurs upon the issue thus stated in showing that the rear brakeman, Provo, was either at or near the north end of the train when it approached the crossing, backing northward; that such brakeman in either position could have obtained sight of the approach of the deceased a short distance only east of the crossing; that he saw the deceased and his team approaching at a walk, when a few feet distant from the tracks; that immediately thereupon he whistled and cried out to warn the deceased of the danger, but did not attempt to signal the engineer to stop the train until after such warning and about the instant the team entered upon the crossing. The only conflict in the testimony upon this point is in reference to the exact location of the brakeman,—whether he had reached the rear car, or was on the next car forward, and merely in the act of passing to the rear car,—and, perhaps, disagreement as to the time and character of his warning to the deceased. As stated by the witness Provo, he climbed upon the rear car of the backing train at the switch, and was there stationed and on watch up to the crossing. He observed the approach of the deceased when the train was about 50 feet from the south side of the street and the team was 10 or 15 feet east of the main track, or about 30 feet east of the passing track, on which the train was moving,—the team being upon a walk, and the train backing at the rate of 6 or 7 miles per hour,—and immediately gave a shrill whistle and a cry of warning to attract the attention of the deceased, but the deceased drove on without noticing the warning or looking in the direction of the train until the instant of collision; and he testifies that the train could not have been stopped before the crossing was reached by a signal to the engineer from the earliest moment it was possible to observe the team from any position on the rear car, and for that reason no such signal was attempted. This testimony is corroborated by other witnesses for the defendant, and by certain of those called by the plaintiff, to the extent of showing the presence of the brakeman on the rear car and his efforts to warn the deceased. Other witnesses on behalf of the plaintiff testify that the brakeman was on the second car from the rear when he whistled or cried out, but was running or walking rapidly in the direction of the rear car.

This instruction thereupon unmistakably states these propositions: (1) That it was the absolute duty of the defendant in such case “to have had a brakeman stationed on the rear or hindmost car of said backing train”; (2) that “immediately on the appearance of danger” the brakeman must use “reasonable care in signaling the engineer operating such train of such danger,” for the purpose of stopping the train, if that can be done “by the exercise of reasonable care”; (3) that if “there was no brakeman stationed on said rear car” the defendant was guilty of negligence; and (4) that it was alike guilty if the brakeman saw the deceased “approaching the track” and “in

a position of danger, and likely to be run into and injured, unless the speed of the train was checked," and then failed to signal the engineer, if the jury further believe from the evidence that the signal could then have been given and the train checked "sufficiently to have avoided the injury." The jury were thus instructed, under the one aspect of the testimony, that the defendant was guilty of negligence, as a conclusion of law, if the brakeman was not "on the rear or hindmost car" when it approached the crossing, and without submitting to their consideration the questions of fact as to the environment and the exercise of care, both on his part and in the operation of the train. So directed, the finding of negligence was inevitable, if the jury accepted as true the testimony that the brakeman had not reached a station on the rear car. The operation of backing a train is one of special danger, demanding the exercise of care throughout the operation commensurate with the danger involved; and such care is of the utmost importance when the cars are backing over a street crossing of the character shown in this instance. As one of the provisions to that end, the requirement is well recognized to have one of the train crew in position upon the rear of the backing train to watch the track and approaches to the crossing, and give needful warnings and signals. But the inquiry whether the brakeman proceeded with due care and celerity, or was in position for performance of this duty, is one of fact, and under the testimony in this case, at least, the peremptory and unqualified direction thereupon was erroneous.

The alternative proposition, as to the duty of the brakeman to signal the engineer "immediately on the appearance of danger" to the person approaching, is equally faulty, and perhaps the more serious error, in view of the conceded fact that such signal was not given until after the attempted warning and about the instant of collision. It ignores the testimony of the prior attempt to warn the deceased, when he was at sufficient distance to have stopped his team, then on a walk, and when the brakeman on the backing train was in plain view, if the driver had looked in that direction, and places the test of liability upon the failure to signal the engineer, if the jury "believe from the evidence" that the signal could then have been given and the train checked "sufficiently to have avoided the injury." In other words, it withholds from consideration the exercise of duty in giving warning,—a duty which was of equal, if not greater, importance under the conditions,—and charges liability for assumed error on the part of the brakeman in his effort to warn the deceased on the instant of discovering his approach, instead of giving a signal to stop the train, provided the jury believe the train could then have been stopped before collision. The emergency which confronted the brakeman demanded instant action in one or the other of these two courses, and in such case the rule for which the defendant contends is not without support

by excellent authorities,—namely, that the master is not rendered liable for a mistaken exercise of judgment by the servant in making his instant choice. *Lewis v. Railroad Co.*, 162 N. Y. 52, 62, 56 N. E. 548. It is unnecessary, however, for the purposes of this case, to ascertain either the correctness of the instruction requested and refused upon such contention, or the existence of such general rule, as there was manifest error in so instructing the jury that the issue of reasonable care on the part of the brakeman was limited for their consideration to the single course of an effort to stop the train,—an effort not made until after the attempted warning; and this restriction of the exercise of care on the part of the brakeman was clearly prejudicial, in the absence of correction elsewhere in the charge, whether the test of liability for his conduct is the want of reasonable care under all the evidence or error in judgment. As the entire charge of the court is preserved in the bill of exceptions, and it thus appears that modification of the instruction in question was neither made nor intended, we are of opinion that the assignment of error thereupon must be sustained.

2. The ground which remains to be considered is the alleged error in the refusal of the court to give the peremptory instruction requested in favor of the defendant, upon the evidence of contributory negligence on the part of the deceased. Under the well-settled rules which govern this court, contributory negligence is matter of defense, and the burden of proof is imposed upon the defendant, thus conceding the presumption of fact that reasonable care was exercised; and unless that presumption is clearly repelled by the proof, or in the event of fair conflict in the testimony thereupon, the issue is for determination by the jury, and not subject to express direction by the court. So considered, is there room for reasonable difference of opinion, under the testimony in this case, whether the deceased was in the exercise of such care when he drove upon the crossing? In the recent case of *Railroad Co. v. Freeman*, 174 U. S. 379, 382, 19 Sup. Ct. 763, 43 L. Ed. 1014, the rule of care to be applied is thus stated:

“The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary, and has been affirmed so many times by this court, that a mere reference to the cases of *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, and *Schofield v. Railway Co.*, 114 U. S. 616, 5 Sup. Ct. 1125, 29 L. Ed. 224, is a sufficient illustration of the general rule.”

The testimony in the case at bar establishes these undisputed facts: Mr. Coerver was a man of mature years, with faculties unimpaired, and had been long engaged in the business of distributing oil to customers with his team and tank wagon, taking his supply from an oil tank located near the Fifth street crossing, so that he was familiar with the crossing and with its use in the running and switching of trains; and

the train in question was a regular freight train, engaged in switching operations which were customary at or about such time and place. He approached the crossing from the east, with his usual team and tank wagon, driving at a walk, and having his young son on the wagon seat with him. No other teams were in the roadway east of the track, and no cars were moving, except a single string, which was backing on the middle track and momentarily concealed from view by the depot building and standing cars; and there is no evidence of distracting circumstances to withdraw the driver's attention from the proximity of the crossing. The fact that the caboose standing on the east track may have occupied half of the street, as stated by some of the witnesses, would not have served to distract such attention, though it would tend to obstruct the view. All the witnesses who observed the approach of the team to the crossing concur in their testimony that Mr. Coerver neither checked up, nor appeared to be giving attention to the crossing, tracks, or cars; and this is confirmed by all the circumstances. Before reaching the crossing the fact was apparent that the freight train had arrived, and that its usual operation of switching was to be looked for. This was clearly indicated by the detached caboose and freight car standing on the main track in full view, and there was ample unobstructed view, at a reasonable distance east of the crossing, to have seen the engine and cars engaged in switching south of the depot, had Mr. Coerver looked in that direction. Moreover, if the caboose occupied the south half of the street as claimed, such fact would call for the exercise of greater diligence and precaution on the part of the driver in making the crossing than would otherwise be required. With the team perfectly under control, it is plain that a pause to ascertain the safety of the way would have avoided the catastrophe. Upon such state of facts we are of opinion that contributory negligence conclusively appears within the doctrine above cited, followed by this court in recent decisions. *McCann v. Railway Co.*, 44 C. C. A. 566, 105 Fed. 480; *Work v. Railway Co.*, 45 C. C. A. 101, 105 Fed. 874.

The judgment of the circuit court is reversed accordingly, and the cause remanded, with directions to grant a new trial.

GROSSCUP, Circuit Judge (dissenting). I concur in the reversal of the judgment of Court below, upon that portion of the Court's charge to the jury which in effect instructed the jury that unless a brakeman was upon the rear car, the railroad company was, in law, guilty of negligence. I think the learned District Judge was misled by the Illinois statute relating to the operation of trains in switch yards. There are doubtless situations, outside switching yards, in which, at common law, the company should have had a man at the rear end of the train; but his presence there as a matter of careful management is a mixed question of fact and law, not a peremptory command of the law.

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I dissent from the opinion so far as it relates to contributory negligence. It is doubtless the duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track; but the law does not command that he must, in every instance, stop to look and listen. Whether to stop is an essential, is a question of fact to be determined by the circumstances of the given case.

In the case under consideration, both Coerver and his son are dead. What they did in the way both of looking and listening we have no means of knowing, except the inadequate observation of distant witnesses who were under some excitement. The roadway upon which Coerver traveled was not paved. His vehicle was probably comparatively noiseless. The outlook in one direction was unobstructed; in the other, was obstructed by the depot and the standing cars.

We have no right to assume, in the presence of a silence like that of Coerver and his son, that they did not in fact look in both directions and that they did not listen. A stop upon a soft road would have added little, if anything, to their safety, unless one of them had dismounted and walked around the end of the train. I cannot think, from my own observation and experience, that ordinarily prudent men would have taken this precaution. Indeed, it would have looked somewhat extraordinary, and the law imposes no such requirement.

We should start out, in a case like this, with the presumption that two people approaching a track will exercise care. Were they here to testify, they could probably show that they did exercise care, both by looking and listening. The opinion of the majority, upon proof, to my mind wholly unsatisfactory, shifts that presumption, and, thereby, visits upon the dead a result that, had they survived, would probably have been overcome.

AYRES v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania, Jan. 6, 1902.)

[50 Atl. Rep. 958.]

Crossings—Obstructed View—Stop, Look and Listen.

A person attempting to cross a double-track railroad, whose view of the further track is obstructed by a train on the track nearest to him, is guilty of contributory negligence in going on the further track without invitation from the flagman, and without first looking to determine if a train is approaching on such track.

Same—Stop, Look and Listen—Whether Must Stop Again, on or Between Tracks.*

A person stopping, looking, and listening before attempting to cross a double-track railroad is not guilty of negligence per se in failing to again stop, look, and listen when on the track or between the tracks, but the question of his negligence depends on the circumstances of the particular case.

*See generally, *Kallmerten v. Cowen* (C. C. A.), 23 Am. & Eng. R. Cas., N. S., 352, and foot-note.

Ayres v. Pittsburgh, etc., Ry. Co

Same—Same—Complying with Flagman's Invitation to Cross.

Plaintiff was stopped at a double-track railroad crossing by a train going east on the track nearest him, which obstructed his view of an approaching west-bound train on the other track. After the train going east had passed, a railroad flagman on the opposite side of the tracks, having a full view of the approaching west-bound train, signaled plaintiff to cross, which he attempted to do without looking for the approaching train, and was struck and injured by it: *held* not sufficient, as a matter of law, to show that plaintiff was guilty of contributory negligence.

Determining Whether Sufficient Evidence to Go to Jury.

The court, in determining whether the evidence tending to establish a certain issue is sufficient to raise a jury question, will assume the truth of facts of which there is any sufficient evidence.

Instructions—Whether Withdrawal of Question of Flagman's Negligence in Inviting Plaintiff to Cross.

An instruction in a railroad crossing accident case, in which the negligence of defendant's flagman in inviting the plaintiff to cross the tracks in front of a train is in issue, that the fact that the company employed the flagman is only evidence of the additional care exercised by the defendant, cannot be construed as withdrawing the question of the flagman's negligence from the jury, when considered in connection with the general charge that his conduct is to be considered in determining if defendant was negligent or plaintiff guilty of contributory negligence.

Brown, Mitchell, and Fell, JJ., dissenting.

Appeal from court of common pleas, Washington county.

Action by John Ayres against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company for personal injuries received in a crossing accident. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

A. M. Todd and J. A. Wiley, for appellant.

John C. Bane and R. W. Irwin, for appellee.

DEAN, J. The plaintiff, a day laborer in the village of Burgetstown, Washington county, left his home about 7 o'clock on the morning of August 18, 1900, to go to his place of work. To reach his destination he took his way along Washington, one of the principal streets of the village, which is crossed at right angles by the two tracks of the defendant railroad company. The street is a much traveled one both by those outside the town and those in it. Ayres was about 62 years of age, physically active, with senses of sight and hearing unimpaired. The railroad company maintains an automatic electric signal bell at the crossing, which rings as soon as an approaching train reaches and opens the circuit 2,100 feet from the crossing, and continues to ring for about half a minute, or until the train has passed,—this as a warning to those who have reached or are approaching the crossing. In addition the company maintains a flagman at the crossing, whose duty it is to warn persons about to cross of the approach of a train, or to signal them that the crossing is clear, and can be used without danger. The tracks can be seen from the crossing both east and west, for a distance of 900 feet to the east and about 1,300 feet to the west. When plaintiff reached the rail-

road bed, a freight train running east was on the crossing. He stopped, and waited until it had passed. While so waiting, the flagman signaled him twice to cross. The flagman was on the side of the tracks opposite the plaintiff, whose vision to the east was obstructed by the receding freight train on the track next him, but the flagman's view of the track east was clear. When the flagman signaled Ayres to cross, he at once started, and hurried across without stopping. When he got on the west-bound track the flagman signaled him to go back. At the same instant plaintiff saw a locomotive on the east-bound track, coming, and about 30 or 40 feet from him. It occurred to him it was too late to get back, and he made the best effort he could to get across, but the locomotive struck and seriously injured him. The court left the questions of defendant's negligence and plaintiff's contributory negligence to the jury, who found for plaintiff, and we now have this appeal by defendant, alleging error in not giving binding instructions for defendant because of plaintiff's contributory negligence.

Leaving out of view the conduct of the flagman, the plaintiff was unquestionably, under all of our authorities, guilty of contributory negligence. He stopped, looked, and listened before he put his foot on the roadbed. He saw the freight train running east, and waited until it had passed. It then shut off his view to the east, and he could not see if a train were approaching from that direction. If he had assumed, because he did not see one, no train was approaching, and had attempted to cross and been struck, then he assumed the grave risk of a mere guess, and could not recover. While it is an unbending rule that a traveler must stop, look, and listen before crossing at grade the rails of a railroad, it has not been held that as an invariable rule he must stop, look, and listen when on the tracks or between them. It may be that ordinary care, under exceptional circumstances, would dictate that he should stop on the first track to look for an approaching train on the other, or that he should stop on the space between the two sets of tracks; but no such rule applicable to all cases has ever been announced, nor could it, with sound reason, be adopted, because both on the tracks and between them are places of peril in greater or less degree. We have adopted the rule that, a traveler at a crossing having once stopped in a place of safety before going upon the road, and there looking and listening, and, neither seeing nor hearing danger, has then undertaken to cross, yet, nevertheless, the fact that he has once exercised care does not relieve him from the duty of exercising care while in the act of crossing. But what exactly he should then do to absolve himself from negligence must depend on the circumstances of the particular case. It is *per se* negligence to not stop, look, and listen before going on the tracks. It is not *per se* negligence not to stop, look, and listen after getting on.

Thus far we have discussed the law as if no flagman had been there. Plaintiff had stopped in a place of safety, although close to the track. He had used his own judgment, and concluded that it was dangerous to cross because of the coming freight train. He waited until it had passed. Immediately the flagman on the opposite side signaled him twice to cross. He did so without stopping, and was struck. The flagman was only about 24 feet from him, and had the west-bound track in both directions in full view as far as it could be seen. The plaintiff's view was obstructed by the freight train to the east. It may be conceded that, if the track had been as visible to him as to the flagman, he could not, without negligence, have disregarded his own sense of sight, and have relied on the mistake or carelessness of the flagman. But plaintiff could not see a train, and heard no warning. He knew the flagman was experienced, and could see. Why should he not cross? He could see no train. The flagman, who could see, and was placed there to see, in effect said to him there was none. Under such circumstances we cannot say there was an absence of ordinary care in plaintiff relying on the sight of the flagman when, because of the freight train, his own could not avail him. The court left the question of contributory negligence on the conflicting testimony to the jury. In this, we think, there was no error. In discussing this point in the case we have assumed the facts to be as plaintiff alleged them; not that we concur with the jury in their finding, but in determining whether the question was for the jury we must assume facts of which there was any sufficient evidence. The defendant's evidence was flatly contradictory of that given by plaintiff, and, if it had been believed, barred any recovery. We concede that it is a close case, but not closer than *Railroad Co. v. Werner*, 89 Pa. 59; *Same v. Garvey*, 108 Pa. 369. In this last case we said: "There is evidence that on coming to the tracks with his wife and another woman they stopped, looked, and listened, and saw no sign of an approaching train, and heard no locomotive. They started across the tracks, the women a little ahead of Garvey; they crossing safely. In crossing the fourth track a little behind them, he was struck by a passing train, and killed. It cannot be declared as a rule of law that he must stop, look, and listen between the different tracks lying close to each other. Indeed, to so stop, instead of hastening to cross all of them, might have been evidence of negligence. Whether it was less dangerous to move continuously across the tracks than to loiter between them was a question for the jury." This is a closer case than the one before us, for in the case cited no flagman urged the party to cross. To the same effect are *Philpott v. Railroad Co.*, 175 Pa. 570, 34 Atl. 856, and *Railroad Co. v. Coon*, 111 Pa. 430, 3 Atl. 234. The general charge clearly submits to the jury the question of the contributory negligence of plaintiff in view of the conduct of

the flagman. It is argued by appellant's counsel that this question was practically withdrawn from the jury by the court's affirmance of defendant's sixth point. The point is adroitly drawn, and probably was not very closely scrutinized by the court below. The first part of it does apparently conflict with the instruction in the general charge. It asks the court to say that the fact that the company employed a watchman is "only" evidence as to the additional care exercised by it to avoid inflicting injury upon travelers. The significance of the word "only" would, in effect, render the conduct of the flagman immaterial; but the court, in its general charge, had correctly instructed the jury directly otherwise. Then the latter part of the point states the law correctly: "That the fact does not, in any degree, relieve the plaintiff from the exercise of all such caution and prudence as the law imposes upon him, nor from the duty to stop, look, and listen before attempting to cross defendant's tracks." He did stop, look, and listen before attempting to cross, and the jury has found that, in view of the fact that he was grievously misled by defendant's flagman, he exercised all such prudence and caution as the law imposed upon him. They did not narrow the consequence of the flagman's employment to merely an evidence of additional care on the part of the railroad company. They doubtless found that, if the flagman lured a traveler into danger, his act must be imputed as negligence to his employer. The inconsistency of the court's unqualified affirmance did defendants no harm. If the verdict had been the other way, the plaintiff might well have claimed a reversal.

All the assignments of error are overruled, and the judgment is affirmed.

BROWN, J. (dissenting). The affirmance of this judgment by a majority of the court is a deliverance that, if the negligence of a defendant is very gross, the contributory negligence of a plaintiff is no bar to his right to recover. This sets at defiance the authorities, that are uniform, and startles reason, upon which they are founded. That the plaintiff was guilty of contributory negligence, leaving out of view the conduct of the flagman, is concededly clear; but he is to recover because the defendant's employee negligently lured him into danger. If he had looked when he ought to have looked and could have seen, he would have known that the signal of the flagman that he should come on was a beckon to him to rush into danger, and to almost certain death under the wheels of a rapidly approaching locomotive. No prudent man would have heeded such a signal, but would have looked for himself; and yet, under the judgment in this case, for what have heretofore been regarded as legal suicide or injuries resulting from one's own negligence, there can be a recovery. The rule to stop, look, and listen when approaching a railroad crossing has been regarded, and rightly so, as an inflexible one; and the duty to observe it is a personal one, which can

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neither be delegated to nor assumed by another, except as the risk of him about to cross the tracks. Here the appellant relied upon the flagman, but he was bound to rely upon himself. The flagman may have been negligent, and his negligence may have been the negligence of the company that had employed him; but the injured man had not performed his duty in looking where he ought to have looked, and in avoiding the danger which he must have seen was before him if he attempted to cross the tracks. In dissenting from this judgment I cannot make myself plainer than by repeating what was said in *Greenwood v. Railroad Co.*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614, and from which I regret to feel there has this day been an unwise departure: "I do not understand the law to be that when a railroad company adopts safety gates, or any other appliance, for the protection of the public, that the public are thereby absolved from the duty of taking any care of themselves. Conceding that the company was required to take extra precautions by reason of the gates being out of order, yet the plaintiff was also bound to do his part. He had no right to omit the ordinary precautions when approaching a railroad crossing because he finds the gates up. Machinery of all kinds is liable to get out of order, and may do so at just the critical moment of the approach of a train. In all such cases the safety of the traveling public requires that each party shall be held to the exercise of due care. Had this horse carriage stopped near the crossing, instead of rushing on at reckless speed, this accident would not have happened. The train could have been seen for 100 feet before the crossing was reached. If the rule to stop, look, and listen were always observed, an accident at crossings, now so frequent, would rarely occur, whether in town or country. It is difficult to see why the rule is not as important in towns and cities as in the country, where in many instances the track can be seen for a long distance. The rule itself is so valuable, is sustained by such abundant authority, and is, moreover, founded upon such excellent common sense reasons, that we will neither depart from it nor allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence; it is negligence per se."

MITCHELL and FELL, JJ., concur in dissent.

CHICAGO & A. R. Co. v. McDONNELL.

(*Supreme Court of Illinois, Dec. 18, 1901.*)

[62 N. E. Rep. 308.]

Accident at Crossing—Negligence—Raised Gates—Question for Jury.*
Plaintiff, while riding in a street car, was injured by collision at

*As to whether raised safety gates is an invitation to cross, see *Fennell v. Harris* (Penn.), 9 Am. & Eng. R. Cas., N. S., 709, and foot-note; 8 Am. & Eng. R. Cas., N. S., 394 et seq.; 3 Rap. & Mack's Dig. 677 et seq.

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railroad crossing. The car had stopped about 20 feet from the gates at the crossing to allow the train to pass, and after the gates were raised the car was struck as it was crossing the track by the train suddenly backing. The evidence as to whether any warning of the backing was given by the gate keeper was conflicting, and there was no warning of the intention to back given by the men operating the train, or by sounding the locomotive whistle or bell: *held* sufficient to authorize a submission to the jury of the question whether defendant was negligent.

Personal Injuries—Pleading and Proof.

Under an allegation in a declaration for personal injuries that plaintiff's "leg and back were greatly bruised and injured," and that she received terrible nervous shocks, and became sick, sore, and lame, evidence was properly received that the uterus was displaced and the left ovary fallen, and that the womb occupied a "false position," which caused nervousness; it not being necessary to allege specific injuries where general damages are claimed.

Negligence—Instructions—Harmless Error.

An instruction authorizing recovery if the jury should find the defendant guilty of negligence under the evidence, though erroneous in omitting the qualification "and under the instructions of the court," is not prejudicial, where there was no serious question as to the defendant's negligence, and no question whatever as to plaintiff's due care.

Instructions.

An instruction is not erroneous in assuming that plaintiff was injured on the leg and body, where there was no question but that plaintiff sustained such injuries.

Same—Remarks of Counsel Tending to Discredit Their Value.

Where the jury were instructed that the case must be decided on the evidence, under the instructions, and not on the statement of counsel outside the evidence, and that the instructions are the law of the case, a remark by counsel tending to discredit the authoritative value of the instructions as correct legal principles, which was immediately ordered withdrawn by the court, whereupon counsel further explained that he did not wish to be so understood, does not require a reversal of the case.

Appeal from appellate court, First district.

Action by Margaret McDonnell against the Chicago & Alton Railroad Company. From a judgment of the appellate court (91 Ill. App. 488) affirming a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Lee & Hay (William Brown, of counsel), for appellant.

W. S. Johnson, for appellee.

BOGGS, J. The appellate court for the First district affirmed a judgment in the sum of \$5,000 entered in the superior court of Cook county in favor of the appellee and against the appellant company, and a further appeal has brought the record into this court. The declaration was in case, and, in substance, alleged that a street car in which the appellee was riding as a passenger was, through the negligence of employees of the appellant company, run upon by a freight train of the appellant company, and that the appellee was injured in the collision.

It is first urged the court erred in overruling the motion entered by the appellant company at the close of all the evi-

dence to direct a peremptory verdict in its favor. We think the testimony clearly sufficient to justify the submission of the cause to the jury. It appeared from the testimony that on the 20th day of September, 1896, the appellee, then about the age of 16 years, was a passenger on an electric car of the Chicago Street Railway Company, which was moving southward along Halsted street, in the city of Chicago; that the tracks of the railroad operated by the appellant company crossed Halsted street at right angles, and that the appellant company maintained gates at the crossing, which were operated from a tower by one of its employees; that, when the electric car approached near to the crossing of appellant's railroad, one of appellant's freight trains was passing eastward along its tracks across Halsted street; that its employee, the gate keeper, had dropped the gates so as to prevent persons and vehicles from going on to the tracks of the railway company; that the electric car stopped within about 20 feet of the gates; that the freight train passed over or across Halsted street, and the gate keeper raised the gate; that as the freight train was clearing Halsted street the conductor of the electric car left his car and made his way to the railroad tracks, and, when the freight train had passed eastward beyond the limits of the street, signaled the motorman to move the car forward; that the electric car was put in motion, and that immediately thereafter the freight train was given a backward motion, and the conductor of the street car signaled to the motorman to stop, and the motorman attempted to obey the signal, but was unable to stop the car in time to prevent a collision, the tracks being wet and slippery, and the grade descending; that the end of the rear car of the freight train struck the electric car and injured the appellee. There was a board fence running eastward from Halsted street on the north side of the railroad track, which obstructed the view of the railroad train from the point in the street where the car was standing. There was testimony tending to show the gate keeper, after raising the gates, rang the bell in the tower, with the view of giving warning that the freight train was about to back across the street, but there was testimony, negative in character, also in denial of this proof; and the testimony of other witnesses was to the effect the bell in the gate tower did not begin to ring until the instant of the collision. The testimony tended to show that no warning of the intention to move backward was given by the bell or whistle of the locomotive, or by any signal or act of any of the men engaged in operating the train. The act of raising the gates by appellant's employee was an invitation to those in charge of the electric car to proceed across the tracks. It contributed to the collision and the consequent injury to appellee. Whether, under the circumstances, it was an act of negligence, was clearly a question for the determination of the jury. So, also, was the question whether, after having passed over the crossing, the moving of the railroad train backward again over the crossing

without any warning, and while the gates were up, constituted negligence. The court did not err in refusing to declare, as matter of law, the evidence was insufficient to justify the submission of the issue of negligence to the jury.

It is next insisted the allegations of the declaration upon the subject of appellee's injuries did not warrant the admission of the evidence of Dr. Dal as to her injury. The declaration sets forth the injuries sustained by the appellee in the following language: "Her back and leg were greatly bruised and injured, and plaintiff then and there received terrible nervous shocks, and thereby the plaintiff became sick, sore, and lame, and has so remained from that time to the present, during all of which time she has suffered great pain, and has been hindered from attending to and transacting her usual affairs and business." Dr. Dal, over the objections of appellant company, was allowed to testify, in substance, that his examination of the appellee disclosed some displacement of the uterus, and that the left ovary had fallen or dropped into the "cul-de-sac of Douglas"; that the womb occupied a "false position," etc.; and that general nervous weakness resulted therefrom. The rule is, where general damages only are claimed, it is not necessary that the injuries received by the plaintiff should be described with particularity in the declaration. When special damages are claimed to have resulted from the injury, the pleading is required to be more specific. If, for instance, only general damages are sought for an injury to a limb, it is sufficient that the declaration shall show, in a general way, that the limb was injured; but if the plaintiff seeks special damages on the ground he was engaged in a business which required specifically the use of the limb, and the injury deprived him of this special use of it, then the injury to the limb should be specifically stated. *Railroad Co. v. Levy*, 182 Ill. 525, 55 N. E. 554; *City of Chicago v. Sheehan*, 113 Ill. 658; *Publishing Co. v. Behrens*, 181 Ill. 340, 54 N. E. 896; 5 Am. & Eng. Enc. Law, 746-748, and note.

The appellee asked but one instruction. It was designed to enlighten the jury as to the elements of damage proper to be considered if they should find for the plaintiff. It is as follows: "The jury are instructed that if, under the evidence in this case, they find the defendant guilty as alleged in the declaration, then, in estimating or assessing the plaintiff's damages, the jury should take into consideration the personal injury sustained by the plaintiff to her leg and body, if any, as proven, in consequence of the injury in question; also the pain and suffering undergone by her in consequence of her injuries, if any are proved, and any permanent injury sustained by the plaintiff, if the jury believe from the evidence that the plaintiff has sustained such permanent injury in consequence of the accident in question, and all damages, present and future, which, from the evidence, can be treated as the necessary and direct result of the injury complained of, excepting

such loss of time, if any, as occurred before the plaintiff became eighteen years of age." The appellate court, in disposing of the complaints as to this instruction, in the opinion rendered in the cause said: "Complaint is made that the words 'and under the instructions of the court' should have been added to the hypothesis, 'if, under the evidence in this case, they find the defendant guilty as alleged in the declaration.' * * * Where the hypothesis presents not alone the finding of facts, but as well the determination of the issue of guilty or not guilty, then it should include not only the evidence as the basis of findings of fact, but also the instructions of the court, as the guide for applying such findings of fact to a determination of the issues. *Harvey v. Hamilton*, 54 Ill. App. 507, affirmed in 155 Ill. 377, 40 N. E. 592. * * * We are of opinion that in this case, the direction being, in effect, that, if the jury found the defendant guilty, it should have been qualified by 'under the instructions of the court,' as well as by 'from the evidence.' We are not, however, of the opinion that the error of this instruction should cause a reversal. There is no serious question as to the negligence of appellant as the proximate cause of the injury, and there is no question whatever as to appellee's due care. The fault of the instruction has no relevancy to the measurement of the amount of the damages. Therefore we think it safe to assume that no prejudice resulted to appellant by reason of the error. It is also objected that this instruction is erroneous in that it assumes that injury did result to the leg and body of appellee. If it does so assume, no harm was done thereby; for there is no question, from the evidence, but that appellee was injured in her leg and body as a result of the collision." These remarks meet our approval, as answering correctly and fully the criticism of the instruction.

We think the contention is groundless that counsel for appellee, in his closing argument to the jury, indulged in remarks which were intended to, and did tend to, discredit the authoritative value of the instructions as correct declarations of the legal principles involved. Possibly a remark made by counsel might have been so understood, but an objection to it was sustained, and the remark directed to be withdrawn, and counsel explained in his further remarks to the jury that he did not wish to be so understood. Moreover, the court, in addition to withdrawing the remarks which evoked objection, gave the jury the following instruction: "(4) This case must be decided by the jury on the evidence, under the instructions of the court, and not upon the statement of counsel outside of the evidence, unsupported by the evidence, if any such statements have been made. The evidence and law alone must govern your verdict. The jury are informed that the instructions of the court are the law of the case, which must govern them."

The judgment of the appellate court is affirmed. Judgment affirmed.

LORENZ *v.* BURLINGTON, C. R. & N. RY. CO.*(Supreme Court of Iowa, Jan. 25, 1902.)*

[88 N. W. Rep. 835.]

Accident at Crossing—Signals—Question for Jury.

Where, in an action for the killing of plaintiff's decedent at a railway crossing, the evidence as to whether defendant's train gave the proper signals was conflicting, the question of negligence was for the jury.

Same—Look and Listen—Question for Jury.*

Where plaintiff's decedent was struck by defendant's train at a street crossing while decedent was attempting to drive back a cow which had escaped from him, his failure to look and listen was not contributory negligence, as matter of law, but the question was for the jury.

Same—Care Required of Traveler—Instruction.

An instruction that it was decedent's duty to exercise such care for his own safety as a person of ordinary care would exercise "in a case of like danger" was not open to the objection that it imposed merely "ordinary care" on a person approaching a railway track.

Appeal from district court, Floyd county; J. F. Clyde, Judge.

Action to recover damages for the death of plaintiff's intestate, alleged to have been caused by negligence of defendant. Verdict for plaintiff. From judgment thereon, defendant appeals. Affirmed.

Ellis & Ellis and S. K. Tracy, for appellant.

P. W. Burr, for appellee.

McCLAIN, J. Deceased was struck by a train on defendant's road at a street crossing, and instantly killed. At the time of the accident he was attempting to head off and drive back a cow which had escaped from his control, and had gone along the street to the crossing and stopped there. Her stopping was due to the barking of a dog which had met her, and continued to obstruct her progress and to bark violently at her while deceased was approaching. There is a conflict in the evidence as to whether proper signals were given by the engineer in charge of the train, and therefore the question of defendant's negligence was properly for the jury. It is also claimed that the train was negligently run at a high rate of speed. The contention of appellant is that deceased was plainly, and as a matter of law, shown to have been guilty of contributory negligence in being on the track before the approaching train at a place where he might, by reasonable care in looking and listening, have seen the danger and escaped it, and that therefore the lower court erred in not directing a verdict for defendant. It is further contended that the court erred in instructing the jury in such a way as to allow them to

*See *Hecker v. Oregon R. Co.* (Ore.), 23 Am. & Eng. R. Cas., N. S., 33, and foot-note.

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determine whether the facts and circumstances surrounding the accident were of such a dangerous, complicated, and confusing character as would be calculated to cause a person of ordinary prudence and caution, under the same conditions, to forget for the instant his dangerous position. It is to be borne in mind that one who is guilty of contributory negligence in connection with his injury is precluded from recovering for such injury not because of a direct breach of duty towards the person whose negligence has primarily caused the injury, but because he cannot recover for an injury to which his own fault has in any way contributed. The negligence of the one party and the contributory negligence of the other are wholly distinct and independent considerations, and the contributory negligence of the person injured may preclude recovery by him, although it had no influence or effect whatever on the party causing the injury, or, for that matter, was entirely unknown to him. Therefore, in determining what constitutes contributory negligence, we are not to consider what care the person causing the injury had reason to suppose the other person would use, but only whether the person injured did use the care which the circumstances required of him. Now, while the rule is well settled in this state, and generally elsewhere, that it is contributory negligence for a person to go upon a railway track without looking or listening to ascertain whether there is danger from an approaching train, yet his duty in that respect is to exercise the care which reasonably prudent persons would exercise under such circumstances. The duty to look and listen is not an absolute one, but one the exercise of which is dependent on conditions. Certainly a person who should rush to rescue a child from danger on a highway, due to an approaching runaway team, might be excused for not stopping to look and listen for a possible train on a railway track which he must cross in order to reach the child. The qualification of the rule which justifies the taking into account of the surrounding circumstances in determining whether there was negligence in failing to look and listen is well established. *Howland v. Railway Co.*, 150 Mass. 86, 22 N. E. 434; *Wasmer v. Railroad Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Thompson v. Railroad Co.*, 110 N. Y. 636, 17 N. E. 690; *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339. And this qualification has been recognized by this court. *Funston v. Railway Co.*, 61 Iowa, 452, 16 N. W. 518; *Lichtenberger v. Incorporated Town of Meriden*, 91 Iowa, 45, 58 N. W. 1058. The question whether, then, in view of the purpose with which deceased went upon the track, and the circumstances under which he did so, he was exercising the reasonable care which an ordinarily prudent man would exercise under the circumstances, was for the jury. We do not mean in any way to question the rule, well established, that where a traveler on a highway approaches a

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railway track for the purpose of crossing it, it is his duty to look and listen for approaching trains, and if it appears without conflict in the evidence that he failed, without reason, to do so, and that had he done so he would have discovered the danger, he is not entitled, as a matter of law, to recover for injury received from being struck by a train. But this is a different case, and the right of plaintiff to recover was properly left for the determination of the jury on the evidence.

Counsel for appellant criticise the instructions of the court on the theory that a person approaching a railway track is bound to use more than ordinary care, but the instructions are not open to the criticism which is made. The court did not tell the jury merely that deceased was required to use ordinary care and vigilance with reference to his own safety, but correctly stated that it was his duty to "exercise such care and vigilance for his own safety as a person of ordinary care and prudence would exercise in a case of like danger." No doubt, an ordinarily prudent and careful person would exercise much greater vigilance with reference to his own safety in approaching a railway crossing than though he were approaching a crossing of two highways, but in each case the vigilance required is that which an ordinarily careful and prudent person exercises under such circumstances.

Affirmed.

BURIAN v. SEATTLE ELECTRIC CO.

(*Supreme Court of Washington, Dec. 14, 1901.*)

[67 Pac. Rep. 214.]

Injury at Crossing of Street Railway—Negligence.

Plaintiff, while crossing a street car track at the top of a hill, was struck by a car which had just ascended the hill. The grade of the hill was 20 per cent., and the car, which was propelled by cable, was apparently stopped as quickly as possible on reaching the level; but before it had cleared the incline the accident had occurred. The speed of the car could not be checked without releasing its grip on the cable: *held* not to show, as matter of law, a want of negligence in the street car company.

Same—Signals.

In an action against a street railway company for personal injuries, where there was some evidence that the gong was not rung, it was a question for the jury to determine what the facts were in that particular, and whether failure to sound the gong was negligence.

Same—Failure to Look for Car—Not Contributory Negligence Per Se.

Plaintiff had crossed one track of a street car company at about the center of the crossing of two streets, and had stopped to wait for a car on the other track to pass. While standing there, he observed that his family had not followed him, and turned to go back, and was struck by a car which had just ascended a hill. He did not turn towards the direction from which the car was coming. There was some evidence that no gong was sounded: *held* not to show contributory negligence as matter of law.

*Burian v. Seattle Electric Co***Contributory Negligence—Direction of Verdict.***

Before the court will be justified in taking from the jury a question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them.

Appeal from superior court, King county; Geo. Meade Emory, Judge.

Action for personal injuries by Gottlieb Burian against the Seattle Electric Company. Judgment for defendant, and plaintiff appeals. Reversed.

Edward Holton James and J. Henry Denning, for appellant. Struve, Allen, Hughes & McMicken, for respondent.

HADLEY, J. The respondent is the owner and operator of a system of street railways in the city of Seattle, and on the 11th day of November, 1900, was engaged in the operation of a line of cars along Madison street, in said city. The westerly end of Madison street is near the waters of Puget Sound, from which point said street proceeds in a northeasterly course, and ascends, for a distance of many blocks, the sloping side of a very high hill. The respondent's cars are moved up and down the slope of said hill along Madison street by means of an underground cable. Madison street is crossed at right angles by the following parallel streets, among others, viz., Second avenue, Third avenue, and Fourth avenue. Those portions of Madison street included in its intersections with said streets at their several places of crossing are practically level, while those portions which lie between said intersections ascend the hill by a very steep grade. Of the streets crossing Madison street above named, Second avenue is the most westerly, and is nearest the westerly end of Madison street. Next easterly, and up the hill, from Second avenue, lies Third avenue, which crosses Madison street one block distant from the crossing of Second avenue and Madison street. Ascending the hill from Third avenue, Madison street proceeds until it intersects Fourth avenue, one block distant. On the day first above named appellant resided at Spring Place, in the city of Seattle, which is located adjoining Madison street, some distance easterly from that portion of Madison street heretofore described. In the evening of that day appellant started with his family to go to Germania Hall, which is located on Second avenue, and to the north of Madison street. The party walked along Madison street to the westward, following the northerly side of said street until they reached Fourth avenue, when they crossed to the

*Contributory negligence as a question of fact, see note, 10 Am. & Eng. R. Cas., N. S., 856; 3 Rap. & Mack's Dig. 282 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) 456 et seq.

Contributory negligence as a question of law, see *Johnson v. Rio Grande W. Ry. Co.* (Utah), 13 Am. & Eng. R. Cas., N. S., 691, and note, 698; 3 Rap. & Mack's Dig. 290 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) 456 et seq.

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southerly side of Madison street, and proceeded along that side of the street down to Third avenue. They crossed over Third avenue, and appellant's wife and daughter and a young lady who accompanied them stood upon or very near the sidewalk at the southwesterly corner of the two streets. Appellant started to cross over Madison street, intending to proceed northerly across Madison street to Seneca street, and thence down Seneca street to Second avenue, and to Germania Hall. As he started across Madison street he proceeded in a diagonal direction with reference to the square formed by the intersection of the two streets. He went in a northeasterly direction until he was some 20 or 25 feet from the westerly line of Third avenue, and was also near the center of Madison street. At this point in Madison street are the double tracks of the Madison Street Cable Line. The northerly track is used by the cars going westerly toward the foot of Madison street and toward Puget Sound. The southerly track is used by those going easterly toward Lake Washington. Crossing the above tracks at said street crossing are also the double tracks of an electric line proceeding along Third avenue. A car on the Madison street line had just come from Lake Washington, and had stopped at the Third avenue crossing. Appellant, from the position above described, stood in the space between the two tracks of the Madison Street Line, and a little in front of and facing said car. He was therefore facing toward the northeast, and stood with his back to the Madison street hill, between Second and Third avenues. While standing there he observed that his family had not followed him, and he turned to go back to where they stood, as above described. He did not turn to the westerly, and look down the Madison street hill, but turned to the right, with his face to the east, and then to the south, and started across the southerly track of the Madison Street Line. While in the act of crossing this track, he was struck by a Madison street car, which had just come up the hill from the direction of Second avenue. He received serious and substantial injuries. Appellant was familiar with the surroundings of the locality and with the manner of operating the Madison street cars. At the trial witnesses testified that they did not hear a gong sounded from the car as it ascended the hill and as it approached and entered upon Third avenue, but, owing to their excited condition of mind at the time of the accident, they were unable to testify that the gong was not in fact sounded. One witness, however, did testify positively to the fact that no gong was sounded from the car at any time as it approached the crossing. At the close of appellant's testimony the respondent challenged the legal sufficiency of the evidence to entitle appellant to a verdict, and moved the court to find as a matter of law that the verdict should be returned in favor of respondent, and also to discharge the jury, and enter judgment accordingly. This motion was granted by the

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court, and judgment was entered that appellant is not entitled to recover in this action against respondent, and that respondent recover its costs. From said judgment this appeal was taken.

It is insisted by respondent that the car which ascended the Madison street hill, being propelled by a cable, could not, with safety to its passengers, be released from the cable until the car had cleared the incline of the hill, and stood upon the level of the Third avenue crossing. The grade of the hill between Second and Third avenues is about 20 per cent., and it is urged that it would be hazardous if a gripman should release the car from the cable at any point on the incline, since it might not be possible by means of brakes to prevent the car from retreating down the hill. The car was apparently stopped as quickly as possible after it reached the level of the Third avenue crossing, but before it had safely landed upon the level its front end reached the point where appellant was crossing the track, and struck him. The speed of the car could not be checked, since it must follow the speed of the running cable at that point. Respondent concludes from the above-stated conditions that no negligence can be attached to it for not checking the speed, or for not sooner stopping the car. We are not at this time prepared to say as a matter of law that respondent's rights are such as may authorize it to maintain a system of operating cars that will prevent it from safely stopping the cars at any point within the distance of an entire block, or at a point where they are in the act of entering upon the level of a street crossing. Respondent's rights in the street are in common with those of other travelers. Street cars are, in the main, governed by the same rules as other vehicles on the street, and their owners have an equal right with the traveling public to use the street. They have no proprietary right to any part of the street. There are some modifications of this rule. For example, as street cars run upon a track, they cannot turn out to one side of it. But there is no exception which relieves a street railway company from exercising as much care to avoid collisions with other vehicles as the drivers of the latter are required to exercise in order to avoid collision with the cars. *Shea v. Railway Co.* (Minn.) 52 N. W. 902; *Traver v. Railway Co.* (Wash.) 65 Pac. 284. The obligations of the street railway company and of other travelers along the street are mutual, and each must exercise care to prevent collisions and accidents. This mutual obligation is as binding between the operator of the cars and pedestrians at a street crossing as it is between the operator and drivers of vehicles at other points along the streets. The car track is as much a part of the street as any other portion of the traveled way, and pedestrians have a right to cross the track, and particularly at street crossings they must of necessity cross it. If the apparatus used in the operation of cable cars renders the street crossing more

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hazardous to other travelers than under ordinary conditions, then the street car company should take every reasonable precaution to protect the public from that additional danger. Other travelers having knowledge of these extrahazardous conditions are also under obligation to exercise reasonable care and caution to avoid the danger. It is not, therefore, within our province to say as a matter of law that no negligence is shown on the part of respondent in the fact that the speed of the car could not be checked, or that it could not be stopped before it reached the point where it did stop. This is a question to be submitted to the jury, that it may determine whether, under all the surroundings, the conditions which created the facts as stated constituted negligence. *Roberts v. Railway Co.*, 23 Wash. 325, 63 Pac. 506; *Schulman v. Railroad Co.* (Super. N. Y.) 36 N. Y. Supp. 439; *Traction Co. v. Scott* (N. J. Err. & App.) 34 Atl. 1094. It has already been said that there was evidence to the effect that no gong was sounded by the operator of this car. Of the number of appellant's witnesses who testified only one testified positively that such was the fact. No other evidence was before the jury upon that subject. Respondent's counsel therefore frankly and honorably concede that for the purposes of this appeal it must be considered that no gong was sounded. It was held in *Towner v. Railroad Co.* (Sup.) 60 N. Y. Supp. 289, that the car company owes a duty to the pedestrian at a street crossing to give some warning of the approach of the car. Again, the same court held in *Huber v. Railroad Co.* (Sup.) 48 N. Y. Supp. 38, that, where the plaintiff testified that he saw the car 300 feet away, it was not negligence to fail to ring the gong, since the only object of the ringing of the gong or bell is to apprise travelers of the approach of the car. See, also, *Schulman v. Railroad Co.*, supra. There being some evidence in this case that the gong did not ring, it became the province of the jury to determine what the fact was in that particular, and also whether such failure to ring constituted negligence under all the facts of the case when considered together. *Traction Co. v. Scott*, supra. Conceding that the record as it stands shows that no gong was rung, still respondent urges that appellant was so palpably guilty of gross contributory negligence that, as a matter of law, it should be held he cannot recover. It is true, it does not appear that he looked or listened for the approach of a car, and in turning to cross the respondent's track he did not turn in the direction from which he knew a car upon that track must come. It has been held by this court that failure to look or listen at a street railway crossing does not constitute negligence per se. *Roberts v. Railway Co.* and *Traver v. Railway Co.*, supra. A distinction is made in those cases between the rule which applies to a street railway crossing and that which applies to the crossing of an ordinary railroad, the reason being that a railroad company has a proprietorship in its right of way, and

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that a greater degree of care is required at a crossing of its tracks than is required at the crossing of a street railway track, the owner of which has no proprietorship in the street, and has only a right upon the street in common with other travelers thereon. The above distinction is supported by the weight of authority. Following the above-named cases, it must be held here that the mere failure of appellant to look or listen was not negligence as a matter of law, but it is a question to be submitted to the jury whether, when considered in connection with all other surroundings in this case, it constituted negligence in fact. The jury might have found that it was appellant's duty, under his peculiar surroundings, which were well known to him, to turn toward the direction from which the car came and look, or that he at least should have listened. Again, they might have found that circumstances and surroundings were such as did not charge him with that duty. Under the record they might also have found that the failure to ring the gong was negligence, and that, if the gong had sounded the alarm, appellant might have heard it in time to have protected himself. These are questions which, we think, must be submitted to the jury. Under our system of jurisprudence the jury is constituted the functionary which must pass upon these questions of fact. It is not a question of what may be our individual opinions as to the facts shown by the record. The law casts that duty upon the jury as a distinct and auxiliary branch of the court, and, unless the evidence shows negligence on the part of appellant as a matter of law, it is his right to have the facts submitted to a jury. This court has held that generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and that it is only in rare cases that the court is justified in withdrawing it from the jury; that there may be cases where the circumstances are such that the standard of duty is fixed and the measure of duty defined by law, and is the same under all circumstances; and again, that the facts may be undisputed, and may be such as prevent but one reasonable inference being drawn from them. If, however, different results might be honestly reached by different minds, then negligence is not a question of law, but is one of fact for the jury, and before the court will be justified in taking from the jury the question of contributory negligence the acts done must be so palpably negligent that there can be no two opinions concerning them. *McQuillan v. City of Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 787; *Steele v. Railway Co.*, 21 Wash. 287, 57 Pac. 820; *Traver v. Railway Co.*, *supra*. The above principle we believe is sustained by the weight of authority. It has, in any event, become the settled doctrine of this court. From the views heretofore expressed, it follows that we think the acts charged to appellant here as contributory negligence, when considered with all the facts shown by the record, are not such as must

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necessarily lead to but one conclusion in the minds of reasonable men. We therefore think the court erred in taking the case from the jury and in refusing to grant the motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to the lower court to grant a new trial.

REAVIS, C. J., and WHITE, FULLERTON, ANDERS, MOUNT, and DUNBAR, JJ., concur.

FEJDOWSKI v. PRESIDENT, ETC., OF DELAWARE & H.
CANAL CO.

(*Court of Appeals of New York, Nov. 22. 1901.*)

[61 N. E. Rep. 888.]

Accident at Crossing—Instructions.*

In an action to recover for the death of plaintiff's intestate, killed on a railroad crossing, there was no evidence that such intestate looked or listened. The court instructed that the jury might consider all the circumstances, and determine whether he looked or listened, and whether he could have seen or heard the approaching engine if he had done so: *held* erroneous, since a verdict for plaintiff might have been based on the assumption that he did look and listen.

Appeal from supreme court, appellate division, Third department.

Action by Apolonia Fejdowski, administratrix of Wincenty Fejdowski, against the president, managers, and company of the Delaware & Hudson Canal Company. From a judgment of the appellate division (64 N. Y. Supp. 1135) affirming a judgment for plaintiff, and dismissing an appeal from an order of the appellate division (56 N. Y. Supp. 1107) reversing an order of the trial term setting aside a verdict in favor of plaintiff and granting a motion for a new trial, defendant appeals. Reversed.

This action, brought to recover damages resulting from the death of the plaintiff's intestate, caused, as alleged, by the negligence of the defendant, resulted in a verdict for the plaintiff, rendered on the 9th of April, 1897. A motion for a new trial made by the defendant at the trial term upon the minutes of the judge resulted in an order setting aside said verdict and granting a new trial. On the 17th of January, 1899, said order of the trial term was reversed by the appellate division (56 N. Y. Supp. 1107), and on the 26th of June following judgment was entered on the verdict in favor of the plaintiff. On the 8th of July, 1899, the defendant appealed to the appellate division from said judgment, and gave notice that it intended "to bring up and have reviewed an order of said appellate

*As to whether there is a presumption of negligence where a person is killed by a train, see *St. Louis, etc., Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123, and foot-note.

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division made January 17, 1899, * * * which reversed an order of the trial term setting aside a verdict in favor of the plaintiff." On the 15th of May, 1900, the appeal from the order was dismissed, and the judgment was affirmed. 64 N. Y. Supp. 1135. On the 26th of November, 1900, the defendant appealed to this court from the order of dismissal and judgment of affirmance, but gave no notice of its intention to bring up for review the order of January 17, 1899, reversing the order of the trial judge in setting aside the verdict. Upon the argument before us the defendant moved for leave to amend its notice of appeal by inserting such notice of intention, which motion was opposed by the respondent upon the ground, among others, that, as the time to appeal had expired, the amendment would, in effect, enlarge the time to appeal, and hence was not within the power of the court. The facts, so far as material, are stated in the opinion.

Lewis E. Carr, for appellant.

Daniel Naylor, Jr., and Edward C. Witmyer, for respondent.

VANN, J. (after stating the facts). Edison avenue is a public and much-traveled street in the city of Schenectady, 50 feet wide, with a sidewalk on each side. It runs approximately north and south, and crosses at right angles and at grade the single-track railroad of the defendant. East of the crossing the track is straight for upwards of 700 feet, and is elevated above the adjacent land from 6 to 8 feet. To an observer standing at the crossing, or within 20 feet north thereof, the track towards the east is plainly visible by daylight for a distance of about 1,000 feet. At about half-past 6 in the evening of October 17, 1895, the plaintiff's intestate, who was a sober and industrious man about 40 years of age, and in full possession of his faculties, was driving from the north on Edison avenue towards the crossing in question. When seen about 300 feet north of the crossing, he was seated on a high seat at the front end of a two-horse market wagon, driving his team of two horses on a walk. When he was about 15 feet from the crossing, and his horses somewhat nearer, he stopped to enable a train of the defendant, consisting of a locomotive, tender, and eight or ten freight cars, which was rapidly approaching from the east, to pass by. The night was cloudy and dark, with neither moon nor stars visible. There was no flagman at the crossing, nor light near it. The freight train made a loud noise, and after it had reached a point about 100 feet west of the crossing the decedent said, "Get up." The team started, and as he was thus driving across the track he was struck by an engine following a short distance behind the train and instantly killed. His head was found 80 feet and his body 100 feet west of the crossing. This engine was not running on regular time, but was backing "wild" from the east at from 25 to 30 miles an hour, with a

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lighted headlight on the east end, but no light on the west end, and without ringing the bell or sounding the whistle. The freight train was about 200 feet ahead of the engine, and the loud noise made by it was audible when the engine reached the crossing. There was no evidence tending to show that the decedent either looked or listened, and it did not appear whether he was familiar with the crossing or not. A witness, whose eyesight and hearing were good, was walking on the sidewalk close to the decedent as he drove along the street. Both stopped and waited for the freight train to pass. As the decedent started to drive over the track the witness walked alongside, and, as he testified, listened and looked to the east all the time as he went forward to the track, but neither saw nor heard anything of the approaching engine until the crash came. He heard the noise of the train passing on to the west, but did not see or hear the engine coming on from the east, although he was where he could have seen it if it was visible, and could have heard it if it was audible above "the roar of the train." These leading facts, which might have been found from the evidence, justified the trial judge in submitting the case to the jury. There was a sharp conflict in the testimony, but the affirmance by the appellate division, although not unanimous, places it beyond our power to weigh the evidence. Our power of review in this regard extends no farther than to inquire whether there is any evidence which would warrant a reasonable man in finding the facts in accordance with the theory of the plaintiff.

If the defendant, as the jury might have found from the evidence, backed its locomotive over the crossing in question at a high rate of speed during a dark night, with no light on the end of the tender, and without giving any warning of its approach, although it was but a short distance behind a train going in the same direction on the same track, it failed to discharge the duty which it owed to the decedent, of exercising reasonable care to protect him from injury. *Brown v. Railroad Co.*, 32 N. Y. 597, 88 Am. Dec. 353; *Pruey v. Railroad Co.*, 41 App. Div. 160, 58 N. Y. Supp. 797; *Id.*, 166 N. Y. 616, 59 N. E. 1129. If this was the sole cause of his death, the defendant is liable. If, however, his own negligence was a contributory and proximate cause, the defendant is not liable. While the general rule requires a traveler upon a public highway, who is about to cross at grade the track of a railroad, to both look and listen in order to learn whether a train is approaching, it is applied only "when it appears from the evidence that he might have seen, had he looked, or might have heard, had he listened." *Smedis v. Railroad Co.*, 88 N. Y. 14, 20; *Thompson v. Railroad Co.*, 110 N. Y. 637, 17 N. E. 690; *Palmer v. Same*, 112 N. Y. 234, 243, 19 N. E. 678; *Pruey v. Same*, 41 App. Div. 160, 58 N. Y. Supp. 797; *Id.*, 166 N. Y. 616, 59 N. E. 1129. He is not required to look or

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listen when neither would do any good, and such, as the jury might have found, was the situation when the decedent met his death. The fact that an observer in the possession of all his faculties, who was very near the decedent, and walked alongside as he drove from the point where he stopped until he reached the track, and looked and listened all the time, but did not see or hear the approaching engine, is some evidence, when considered in connection with the surrounding circumstances, that, if the decedent had looked and listened, he would neither have seen nor heard.

We find no error in the record before us, except the following, which compels us to reverse the judgment: In the body of his charge the trial judge instructed the jury as follows: "You cannot find the defendant liable unless you find that the deceased at the time did look and listen; did exercise the vigilance which the law casts upon him to protect himself in that respect. You cannot find that fact simply from the presumption that a man will use such care to preserve his own life, because human experience demonstrates that men at times will be careless, and that men at times are killed by reason of their carelessness. For that reason the law casts the burden upon the plaintiff of showing that at the time the deceased lost his life he had exercised that care which the law says he must exercise, namely, to be vigilant as he approached that crossing. Is that shown by the evidence in this case? It is for you to say. You cannot determine it simply from that fact that he was killed, but you have the right to take all the circumstances into consideration. You cannot determine it simply from the fact that a witness upon the sidewalk looked and listened, and say from that that, had the deceased looked and listened, he would not have seen this approaching train, or would not have heard it; but take all these circumstances into consideration and determine whether or not he did look and listen, and determine whether or not he could have seen or heard that approaching train had he done so." The defendant excepted "to the court's submitting to the jury to find as a fact from all the evidence whether the deceased did in fact look and listen." At the request of the defendant's counsel the court charged that "the fact that the witness Wrobleskie looked in the direction from which this engine came and saw nothing does not prove that the deceased, nearer to the track and seated in a wagon, in the manner testified to, would not have seen the approaching engine in time to have avoided it had he looked in that direction; nor does the fact that he said that he listened and heard nothing prove that the deceased, situated as he was, would not have heard the engine approaching had he listened." After charging this request in the language of the defendant's counsel, the court added: "The effect of that is that the witness says he looked and listened, but that does not establish as a fact

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that, had the deceased looked and listened, he would not have seen or heard." At the request of the counsel for the plaintiff the court charged that if the jury "find that the deceased could not have seen the engine, even if he had looked, and could not have heard it, even if he had listened, that it is for them to say under those circumstances whether he was negligent in not seeing or hearing." After charging this request, the court added: "Of course, if it would not have done him any good to have looked or listened, then it does not injure the plaintiff's case if he did not look or listen." As already stated, we think the evidence justified the trial judge in submitting to the jury the question whether, if the deceased had looked and listened, he could have seen or heard the approaching engine. He had no power, however, to permit the jury to find that the decedent did in fact look or listen, because there was no evidence, express or circumstantial, warranting the inference that he did either. From the fact that the court submitted this question to them, the jury had the right to assume, and are presumed to have assumed, that there was evidence in the case from which they could infer that the decedent looked and listened. They were not told what it was, and were left to speculate upon the subject. While they may have found that, if the decedent had looked and listened, he could not have seen or heard, which would support the verdict, they may have found instead that the deceased did in fact look and listen. The trial judge having told them that they might so find, we are unable to say they did not so find; hence the verdict may be predicated upon a finding that is not warranted by the evidence. The error was not cured by charging the plaintiff's request, because that did not withdraw the previous erroneous instruction, but simply submitted an additional question for the jury to pass upon, leaving them still at liberty to base a verdict for the plaintiff on a proposition unsupported by evidence.

For this error, the judgment must be reversed and a new trial granted, with costs to abide the event. This conclusion makes it unnecessary to pass upon the effect of that part of the notice of appeal relating to the order. The appeal from the order should be dismissed, without costs, and the motion to amend the notice of appeal denied, without costs. *Hoffman v. Railway Co.*, 149 N. Y. 599, 44 N. E. 1124.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, and MARTIN, JJ., concur. LANDON, J., not sitting.

Judgment reversed, etc.

HURLEY v. WEST END ST. RY. CO.*(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 4, 1902.)*

[62 N. E. Rep. 263.]

Street Railways—Injuries at Crossings—Contributory Negligence—Taking Case from Jury.*

Where plaintiff, in the daytime, drove across the tracks of a street railway, on which he knew electric cars were running, without looking to see whether a car was coming or not, and knew nothing of its approach until it hit the hind wheels of his wagon, or until it was a rail off, it was proper, in an action for the injuries, to rule that plaintiff was not in the exercise of due care, and take the case from the jury.

Exceptions from superior court, Suffolk county; Chas. A. Libbey, Judge.

Action for injuries by one Hurley against the West End Street Railway Company. Judgment in favor of defendant, and plaintiff excepts. Exceptions overruled.

C. F. Cronin and G. A. Healy, for plaintiff.

Geo. H. Mellen, for defendant.

LATHROP, J. On August 17, 1897, at 10 o'clock in the forenoon, the plaintiff, a man 36 years of age, was driving at a dog trot, in a light grocery delivery wagon, on A street, towards Fourth street, in South Boston. At the intersection of these streets one of the hind wheels of his wagon was struck by an electric street car, and the plaintiff was thrown onto the shafts, and was injured. The only question before us is whether the judge who tried the case was right in ruling that the plaintiff was not in the exercise of due care, and in taking the case from the jury. We are of opinion that the judge was right. It is apparent from the plaintiff's testimony that he knew that electric cars were running all the time on Fourth street; that he did not look to see whether a car was coming or not; and that he knew nothing of the car until either it hit his wagon, or was a rail off, and so right upon him. He testified both ways on this point. The only excuse he offers is that he did not suspect the car was coming because he did not hear the gong sound. It is apparent from the testimony of the plaintiff that he entirely failed to do for his safety what ordinarily careful persons are accustomed to do under like circumstances. *Kelly v. Railway Co.*, 175 Mass. 331, 56 N. E. 285.

Exceptions overruled.

*As to the effect of contributory negligence in failing to stop, look and listen, in actions for injuries at crossings, see generally, *Olson v. Northern Pac. Ry. Co.* (Minn.), 23 Am. & Eng. R. Cas., N. S., 352, and foot-note.

As to whether the stop, look and listen rule applies to street railways, see *Cowden v. Shreveport Belt Ry. Co.* (La.), 23 Am. & Eng. R. Cas., N. S., 355, and foot-note.

LOUISVILLE & N. R. Co. v. COOPER.*(Court of Appeals of Kentucky, Dec. 19, 1901.)*

[65 S. W. Rep. 795.]

Failure to Signal for Street Crossing.*

The failure of the servants in charge of a train to give a signal of its approach to a street crossing in the heart of a small town, and to keep a lookout for persons on the street, was negligence.

Contributory Negligence—Crossing Track without Looking Again.*

Where plaintiff, when 110 feet from a street crossing, saw a freight train standing 150 yards from the crossing, it was a question for the jury whether she was guilty of contributory negligence in attempting to cross the track without looking again, the evidence authorizing the conclusion that the train moved down with not enough noise to attract attention.

Damages—Instructions.

Defendant cannot complain of an instruction telling the jury that, if they should find for plaintiff, to find for her such "compensatory damages" as they believed from the evidence she sustained by reason of being struck by the train and injured, the evidence being confined by the court to the physical injuries and suffering of plaintiff, and no further instruction on the subject being asked by defendant.

Street Crossings—Lookouts—Signals—Gross Negligence.

It was proper to submit to the jury the question whether the failure to give signal of the approach of the train to a street crossing and to keep a lookout for persons on the street was gross neglect, so as to authorize punitive damages.

Excessive Verdict.

As plaintiff suffered acutely, was confined to her bed five or six weeks, at the end of three months could walk only a little by following a wall, at the time of the trial (about nine months after her injury) she was still unable to work, and her physician testified that her injuries were probably permanent, a verdict for \$2,500 is not excessive.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by Mary A. Cooper against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward W. Hines and J. A. Mitchell, for appellant.

W. L. Porter and V. H. Baird, for appellee.

HOBSON, J. The town of Cave City, in Barren county, has a population of between 400 and 500 people. One of the streets of the town crosses the track of the Louisville & Nashville Railroad Company at right angles near the depot. There is an open park along the side of the railroad east of it and north of the street. In June, 1899, Mary A. Cooper, a maiden lady, who lived on the west side of the railroad, went along the street across the railroad and beyond the park to a millinery store, and as she returned from the millinery store, when

*See *Born v. Philadelphia & R. R. Co.* (Penn.), 22 Am. & Eng. R. Cas., N. S., 723, and foot-note.

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she got to the corner of the park, or 110 feet from the crossing, stopped and looked. She saw a freight train standing still 150 feet north of the crossing, and, supposing that she could safely cross, walked onto the railroad, paying no attention to the train, as it was standing still. Just as she reached the track, and before she got fairly on it, she was struck by the bumper on the side of the engine, and knocked off, sustaining serious injuries. The train had been put in motion after she looked, and had run down to the crossing without any signal bell or whistle, and without any outlook being kept by any one on it. The fireman was shoveling in coal, and the engineer had his back to the front of the train, and was looking to the rear. For this injury she filed this suit, and recovered judgment for \$2,500.

The facts are satisfactorily established as above stated, and on them the negligence of the defendant cannot well be questioned; for, although the train was running slowly, it was the duty of the defendant, in moving its train over a street crossing in a town like this, to give proper notice of its approach, and to keep an outlook, so as to avoid unnecessary injury to persons on the street. The main question made by appellant is that appellee is guilty of contributory negligence; that, if she had looked, the train was in plain view, and she could have seen it before stepping on the track. It is also urged that the puffing of the engine was a sufficient signal of the moving of the train, if she had listened. The evidence is not clear that the noise of the train was sufficient to apprise appellee of its approach. She says she did not hear it, and that the first she knew of the train was when it struck her. From other evidence we think it may be concluded that the train moved down very quietly, and with not enough noise to attract attention. Appellee had a right to assume that in moving its train appellant's servants in charge of it would give proper signals by bell or whistle before running upon the crossing, and when she saw it standing still 150 feet away we think it was properly left to the jury to determine whether she exercised such care as might reasonably be expected of a person of ordinary prudence, situated as she was, in thinking that she might safely cross the track at the street crossing, in the absence of any signal of the movement of the train. The map filed by appellant shows that the crossing was in the heart of the town, near the station, and at such places the presence of persons on the highway might be reasonably anticipated; and those using the crossings were not required to assume that appellant's servants in charge of its trains would exercise no care to give notice of its approach. When appellee stopped and looked and saw the train standing still, we do not think it should be held as a matter of law that she was guilty of negligence in not anticipating that the train might be started and run upon the crossing without any signal of its approach before she would pass over it. If appellee, on

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reaching the corner of the park, had stopped and looked, no train being in sight, and her range of view being sufficient to protect her from trains operated according to the usual course of business, it would hardly be maintained that she could not recover if struck by a train running at a greatly unusual speed without signal of its approach or outlook. The standing train was not a source of danger, and whether appellee was negligent in not anticipating that it would be moved noiselessly, and without warning, before she crossed the track, would depend on the time that it would take, the usual course of business, the character of the crossing, and a number of other circumstances. It was a question on which men might reasonably differ in opinion, and under the evidence a peremptory instruction should not have been given. In *Railroad Co. v. Hoel*, 12 Bush, 41, the plaintiff found a train standing across the crossing, and waited for it to move. As she got upon the track she was struck by another engine immediately following the departing train, and it was insisted that a peremptory instruction should have been given. This court held the question one for the jury, and, after quoting authorities to the effect that, in the absence of the usual signals of the approach of a train, the traveler on the highway had the right to presume that the track was clear, it said: "It cannot be regarded as a fixed rule that the failure to look for the approach of a train is negligence on the part of the party injured, as there may be proper diligence without the exercise of this precaution." In *Ramsey v. Railroad Co.*, 89 Ky. 99, 20 S. W. 162, this case was approved, and the court said: "It would be unreasonable to require each one of the hundreds or thousands of persons passing daily on foot or in vehicles along a public street in a populous, busy city or town to stop at a railroad crossing in order to listen or look up or down the track, sometimes visible but a short distance, to ascertain whether a train is approaching, when they can, without doing so, have comparative security against inconvenience and injury by a reduction of the speed of the train, and be easily and certainly warned of its approach by the bell or whistle." These principles were recently applied by this court in *Crowley v. Railroad Co.*, 55 S. W. 434, on facts not unlike the case before us.

It is insisted for appellant that the court erred in not defining to the jury the term "compensatory damages." The instruction which was given on the motion of the plaintiff in substance directed the jury, if they found for the plaintiff, to find for her such compensatory damages as they believed from the evidence that she sustained by reason of being struck by the train and injured. The defendant did not ask the court to give any further instruction on this subject. The instruction as given was proper, and, if the defendant desired a further instruction on the subject, it should have asked it. In a civil case the circuit court is not required to give the jury the whole law of the case, but it is assumed that the parties

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will ask such an instruction as they deem proper to secure a fair trial before the jury. The evidence was confined by the court to the physical injuries and suffering of the plaintiff, and under the evidence we do not see that the defendant was substantially prejudiced by the failure to define the term "compensatory damages." The proof showed that appellee was confined to her bed five or six weeks, that at the end of three months she could walk a little by following a wall, and at the time of the trial was still unable to work. This was in March of the next year. She suffered very acutely, and her physician gave as his opinion that her injuries were probably permanent. The verdict was not excessive. The evidence was sufficient to warrant the submission to the jury of the question of gross neglect. *Coal Co. v. Harshaw* (Ky.) 29 S. W. 289. The court, by instruction "A" given on the motion of the defendant, aptly submitted to the jury the question of contributory negligence. On the whole case we see no error in the record to the substantial prejudice of appellant. In *Railroad Co. v. Case's Adm'r*, 9 Bush, 728, the recovery was sought for death, and it was essential to tell the jury that the loss of the deceased's power to earn money was the thing to be recovered for; but in this case a very different rule applies. *Railroad Co. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480. Judgment affirmed.

HAMILTON v. CONSOLIDATED TRACTION CO.

(*Supreme Court of Pennsylvania, Jan. 6, 1901.*)

[50 Atl. Rep. 946.]

Street Railways—Crossings—Vehicles—Collision—Contributory Negligence—Question for Jury.*

Plaintiff's evidence showed that as he was driving he approached an intersecting street along which ran defendant's street railway, and saw a car turning into the intersecting street; that the car was about 220 feet away; that, thinking that he had time to cross, he drove on, and, before his wagon crossed the second track, it was struck by the car. Plaintiff testified that when he saw the car the motorman was standing away from the brake and looking from the side of the car. Had the car continued at ordinary speed plaintiff's wagon would have crossed in safety: *held*, that the question of contributory negligence was for the jury.

Appeal from court of common pleas, Allegheny county.

Action by William C. Hamilton against the Consolidated Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Knox & Reed and Edwin W. Smith, for appellant.

J. S. & E. G. Ferguson and Robt. H. Douglass, for appellee.

*As to the effect of contributory negligence in attempting to drive across railroad tracks in front of a moving train or car, see *Hanson v. Pennsylvania R. Co.* (N. J.), 12 Am. & Eng. R. Cas., N. S., 404, and note, 406 et seq.; 3 Rap. & Mack's Dig. 625 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) 438 et seq.

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MESTREZAT, J. The plaintiff was injured by a collision between his wagon and a car of the defendant company at the intersection of Old avenue and High street, in the city of Pittsburg, on the afternoon of the 21st day of May, 1900. Old avenue runs almost parallel with Fifth avenue, and crosses High street at a point about 250 feet from Fifth avenue. The defendant company occupies High street with a double track of street railway from Fifth avenue to Forbes street. Plaintiff's testimony shows that on the day of the accident he was driving east on the south side of Old avenue in a covered wagon, drawn by two horses. There were windows in the side of the wagon covering, through which he could see. As he proceeded toward High street, he was watching for a car, but heard no bell or other signal of an approaching one. He looked towards Forbes street, and saw no car. Then he looked in the opposite direction, and saw a car turning from Fifth avenue onto High street. He says that at that time the motorman was looking out Fifth avenue, and was standing away from his brake. The plaintiff was then from 220 feet to 230 feet from the car. At the time he saw the car he had just passed the property line of High street, and his horses were about stepping over the west track. Believing that he had time to cross the track in safety, he drove on. As he did so an east-bound car struck the rear wheel of his wagon near the hub and threw the wagon over and injured the plaintiff. At the place of the accident, Old avenue is about 40 feet between curbs, and about 45 or 50 feet between the house lines. According to the plaintiff's testimony the car did not stop as it turned off Fifth avenue, and ran very fast along High street, with nobody in control of it. The plaintiff says he was cautious in approaching the crossing, as he had been almost caught there by a car on a former occasion. Although listening, he heard no bell or other signal of an approaching car as he neared the crossing. Every material part of the plaintiff's testimony was contradicted by the evidence of the defendant. It tended to show that the plaintiff approached the crossing at a rapid and reckless speed, without looking for a car, and that he drove on the track when the car was about 10 feet from him; that the car stopped when it turned onto High street, and ran slowly down to Old avenue, sounding the gong. It is denied that the motorman was looking out Fifth avenue and did not have his hand on the brake or controller at the time he turned onto High street, or while the car was moving along that street. At the conclusion of the testimony the defendant requested the court to charge that, under all the evidence, the verdict must be for the defendant. This request was refused, and, the case having been submitted to the jury, a verdict was rendered for the plaintiff. The answer to the defendant's point is the only error assigned.

The question involved in this appeal, as stated by the defendant, is whether or not the plaintiff was guilty of negli-

gence contributing to his injuries. It is urged by the defendant's counsel, in support of the appeal, that the plaintiff's testimony shows that he did not exercise proper precaution in approaching the crossing, and that the accident is attributable to his own carelessness. We are not convinced that the learned trial judge committed error in refusing to withdraw this question from the jury. While that body under the testimony submitted might well have sustained the defendant's contention, yet there was sufficient evidence on which to base a verdict for the plaintiff. According to his testimony he approached the crossing in a careful manner, watching for a car in both directions. While he looked before he arrived at the point beyond the house line where he could see, he also continued to exercise prudence and care in this respect after he reached this point. When he had cleared the house line he first saw the approaching car. Before that time, he had heard no bell or other signal, and had no reason to apprehend any difficulty in crossing. At the moment when he first could and did see the car it was at least 220 feet from him, and his horses were about stepping over the track. He then had the right to assume that the car would run at the usual rate of speed, which unquestionably would have permitted him to pass the track without danger of a collision. He was not required to act upon the presumption that the motorman's inattention to his duties when leaving Fifth avenue would continue until the High street crossing was reached. The opposite conclusion was the reasonable one, and would justify the plaintiff in proceeding to cross the track. "A person about to cross a street at a regular crossing," says our Brother Fell, in *Callahan v. Traction Co.*, 184 Pa. 428, 39 Atl. 223, "is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross, if it is run at the usual speed, it cannot be said, as matter of law, that he is negligent in going on. The rule to stop, look, and listen, applicable to the crossing of steam roads, applies only in part to the crossing of street railways. There is always a duty to look for an approaching car, and, if the street is obstructed, to listen, and in some situations to stop." The plaintiff here listened before he arrived at the property line, but had he stopped and looked he would not have seen the approaching car, for the reason, it is true, that his view would have been obstructed, but also for the stronger reason that there was no car at that time on High street. He saw the car the moment it entered upon High street, 75 yards distant, and that was the first time it could have been seen, or he could have known that it would come down High street and cross Old avenue. He then had just passed the property line, and his horses were about to step over the track. Up to this time, regarding the plaintiff's testimony as true, he had exercised the care required of him in approaching the crossing. His subsequent conduct, as has been said, cannot be regarded as negligent. The plaintiff's

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contributory negligence, and the defendant's negligence, were questions for the determination of the jury. The case was submitted in a fair and adequate charge, to which no exception was taken, and we see no reason to interfere with the result.

The assignment of error is overruled, and the judgment is affirmed.

ROBINETTE v. ALABAMA GREAT SOUTHERN R. CO.

(*Supreme Court of Alabama, Dec. 18, 1901.*)

[31 So. Rep. 18.]

Railroads—Public Crossing—Contributory Negligence.*

Where plaintiff's view was obstructed while he was approaching a railroad crossing until he was within a short distance thereof, and he drove on the track without stopping, making an attempt, after he saw the train, to cross in front of it, he was guilty of contributory negligence.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by George W. Robinette against the Alabama Great Southern Railroad Company for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

John H. Miller, for appellant.

Smith & Weatherly, for appellee.

TYSON, J. The evidence shows that plaintiff drove upon the defendant's track without stopping, when his view of the track in the direction from which the train was approaching was obstructed; that his vehicle was immediately struck by the moving train. According to the testimony of the plaintiff himself, the view of those in charge of the train was obstructed by the same obstacle that shut out his own. After passing the obstacle which obscured his view, he discovered the approaching train within a few feet of him, and made an effort to cross the track ahead of it. There is testimony tending to show that he was seen by some of those in charge of the train after he had passed the obstruction, which was some six, eight, or ten feet from the track upon which his vehicle was struck. But there is no evidence tending in the remotest degree to show that the train, the speed of which was some 20 miles per hour, could have been stopped in time to have prevented the injury. On this state of facts, which are without dispute, it must be held that the injuries complained of are directly attributable to plaintiff's own negligence. *Railway Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; *Railroad Co. v. Martin*, 117 Ala. 368, 23 South. 231.

Affirmed.

*See preceding case, and foot-note.

McCracken v. Consolidated Traction Co.*(Supreme Court of Pennsylvania, Jan. 6, 1902.)*

[50 Atl. Rep. 832.]

Action for Death—Elements of Damages.*

In an action for death, evidence as to profits of deceased in a partnership business, and that he furnished money in considerable amounts to his family, is not admissible as bearing on the damages they sustained by his death.

Appeal from court of common pleas, Allegheny county.

Action by Ada McCracken against the Consolidated Traction Company. From a judgment in favor of plaintiff, she appeals. Appeal dismissed.

Dalzell, Scott & Gordon, for appellant.

Knox & Reed, J. H. Beal, George C. Wilson, and W. P. Potter, for appellee.

DEAN, J. This is an appeal from the same judgment which was appealed from by defendant and opinion handed down this day (50 Atl. 830). The assignments are all to rulings of court on offers of testimony by plaintiff to prove extent of damage she sustained by loss of her husband's earnings. In view of judgment in the traction company's appeal, these assignments of error are no longer important in the case. We may say, however, that the court's rulings were correct. Evidence to show the profits of deceased in a partnership business, and that he furnished money in considerable amounts to his family, is not admissible as to the amount of damage they sustained by his death. The appeal is dismissed at the costs of the appellant.

Worcester & S. St. Ry. Co. v. Travelers' Ins. Co.*(Supreme Judicial Court of Massachusetts, Worcester, Jan. 3, 1902.)*

[62 N. E. Rep. 364.]

Insurance—Railroad Injuries—Indemnity—Contract—Construction—Instantaneous Death.†

Where a policy provided that it insured plaintiff against loss from liability to any person accidentally sustaining bodily injuries while traveling on the railroad under circumstances which would impose on the insured a common-law or statutory liability for such injuries, it did not indemnify the insured against a loss sustained by reason of a person being instantly killed without conscious suffering.

Morton and Barker, JJ., dissenting.

*See *Chicago, etc., R. Co. v. Woolridge* (Ill.), 13 Am. & Eng. R. Cas., N. S., 501, and note, 507 et seq.; 8 Am. & Eng. Enc. Law (2d Ed.) 933 et seq.; 3 Rap. & Mack's Dig. 924 et seq.; 15 Cent. Dig., col. 2636 et seq.

†See *Matz v. Chicago & A. R. Co.* (Mo.), 10 Am. & Eng. R. Cas., N. S., 592, and note, 608 et seq.; 3 Rap. & Mack's Dig. 742 et seq.; 8 Am. & Eng. Enc. Law (2d Ed.) 860 et seq.; 15 Cent. Dig., col. 2495 et seq.

Worcester & S. St. Ry. Co. v. Travelers' Ins. Co

Report from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by the Worcester & Suburban Street Railway Company against the Travelers' Insurance Company. A judgment was rendered in favor of plaintiff on the overruling of a demurrer to the declaration, and the case was reported to the supreme judicial court. Judgment for defendant.

B. W. Potter and R. A. Stewart, for plaintiff.

Herbert Parker and Chas. C. Milton, for defendant.

LATHROP, J. By the terms of the policy the defendant insured the plaintiff "against loss from liability to every person, who may, during a period of twelve months" from a time named, "accidentally sustain bodily injuries while traveling on the railroad of the insured, or while in the car or upon the railroad bed or other property of the insured, under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries." The question presented is whether the terms of the policy are broad enough to cover the case where a person who is a traveler on the plaintiff road dies instantly, and without conscious suffering, in consequence of an accident for which the plaintiff is responsible. The plaintiff contends that the terms are sufficiently broad. The defendant contends that the policy is satisfied by limiting the words used to cases of bodily injuries sustained, for which the plaintiff is liable, either at common law or by statute, to the person sustaining the injury, or to his executor or administrator, if the injured person survives the injury and subsequently dies. The diligence of counsel has furnished us with no case in which a policy in the terms of the one before us has been construed, and we are obliged to consider the case mainly upon general principles. It may be conceded that the policy is to receive a reasonable construction in view of the plaintiff's business (*Mandell v. Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291); but when we have said this we have not advanced very far, for it is obvious that the parties may not have intended that all the risks incurred by the plaintiff as a common carrier of passengers should be covered. Whatever was their actual intention, we are obliged to determine the intent from the natural meaning of the language used, viewed in the light of the attendant circumstances. It is plain that an accident insurance policy may insure a person against an injury caused by an accident, or against death resulting from an accident, or it may combine the two. All these forms are or have been in use. It cannot be said, therefore, that in the policy before us death is necessarily included. In this commonwealth there is no common-law liability for death. *Carey v. Railroad Co.*, 1 Cush. 475, 48 Am. Dec. 616; *Moran v. Hollings*, 125 Mass. 93. Nor is there any statute which gives a right of action for the death of a person to his executor or administrator as an

asset of the estate. In all the statutes which have allowed an executor or administrator to bring an action on account of the killing of a person by the negligence of a corporation or its servants the action is for the benefit of the widow, children, or next of kin. Pub. St. c. 112, § 212; St. 1886, c. 140; St. 1887, c. 270; St. 1898, c. 565. An action for a personal injury which has accrued to a person in his lifetime survives since St. 1842, c. 89; Pub. St. c. 165, § 1. But there is nothing in the statutes above cited which recognizes any right of survivorship in case of death. The power to recover in such a case was first given by an indictment, and a fine was imposed for the benefit of the widow, etc., of the deceased. While an action of tort was afterwards allowed, the relief obtained was devoted to the same use, and not to the estate of the person killed. The difference between the right to recover for an injury and for a loss by death has been recognized in our decisions. Thus, under St. 1879, c. 297, which gave, among other things, a right of action to a wife injured in her means of support by reason of the intoxication of her husband against a person causing the intoxication, it was held that no action lay for death caused by intoxication. *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456. Pub. St. c. 52, § 17, gives a right of action not exceeding \$1,000 to the executor or administrator of a person killed by reason of a defect or want of repair in a highway, etc., for the use of the widow and children. Section 18 gives a right of action to a person who "receives or suffers bodily injury" under similar circumstances. These two actions are independent, and both may be maintained, if warranted by the evidence. Thus, in *Bowes v. City of Boston*, 155 Mass. 344, 349, 29 N. E. 633, 15 L. R. A. 365, it was said by Mr. Justice Knowlton: "The right to recover damages suffered in his lifetime by one who dies from an injury received on a highway survives to his administrator for the benefit of his estate, and the damages are estimated on the theory of making compensation. * * * The action by an administrator, under section 17, on account of his intestate's loss of life, is to recover a sum not exceeding \$1,000 for the benefit of the widow and children or of the next of kin of the deceased, to be estimated according to the degree of culpability of the defendant. Both actions, under the statute, may proceed at the same time, on independent grounds, and for different purposes." We are not aware of any legislation in this commonwealth giving a right of recovery for personal injuries which has been construed to give a right of action for death. Nor are we aware of any legislation giving the right of recovery for death in which the fact of bodily injury to the deceased is made an element in the computation of damages. The statutes generally give damages for death between certain fixed limits, according to the degree of culpability of the defendant. They give a new right of action to the executor or administrator, and not a right of action to the

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deceased, which goes to the executor or administrator by survival only. *Com. v. Boston & L. R. Corp.*, 134 Mass. 211, 213; *Littlejohn v. Railroad Co.*, 148 Mass. 478, 483, 20 N. E. 103, 2 L. R. A. 502; *Mulhall v. Fallon*, 176 Mass. 266, 268, 57 N. E. 386. By the terms of the policy the plaintiff is insured against loss from liability to every person who may accidentally sustain bodily injuries under circumstances which impose upon the insured a common-law or statutory liability for such injuries. The liability is to a person who sustains bodily injuries, and such person must have a right of action therefor, either at common law or by statute. The policy cannot include the case of death, for which the person never had a right of action.

According to the terms of the report, the order must be, in the opinion of a majority of the court:

Judgment for the defendant.

MORTON, J. (dissenting). I regret that I am unable to agree with the majority of the court. The question is one of construction, and is whether, in the language of Lord Cairns in *Sackville-West v. Holmesdale, L. R. 4 H. L. 543, 574*, we shall scantily follow the literal sense of the words, and which I agree can be done, or whether we shall construe them liberally, and in a manner more in accord with the nature of the contract and the situation of the parties. It seems to me that the latter course should be followed. The contract is one of indemnity against loss from liability for personal injuries caused by accidents for which the plaintiff was responsible, and the precise question is whether the liability of the plaintiff, which is a street railway company, for damages for death caused by its negligence, comes fairly within the terms of the policy. At common law damages for death caused by the negligence of another person were not recoverable. But such damages are now recoverable by statute in this state and in other states in many cases, and in England generally; and it seems to me that that fact should be borne in mind in construing the policy before us. Pub. St. c. 52, § 17; Id. c. 112, § 212; St. 1886, c. 140; St. 1887, c. 270, § 2; St. 1898, c. 565; 9 & 10 Vict. c. 93; 2 Sedg. Dam. § 571. It is undoubtedly true that such damages do not constitute, generally speaking, assets of the estate of the deceased, and that the right of action is a new one. But it does not follow that the liability to loss on account of personal injuries which is insured against may not be fairly construed to include such damages. Parties well may be supposed to contract with reference to new conditions, though they used the old terms; and in such cases it is the duty of courts to so construe the old terms as to fit the new conditions. The ground on which damages for death are allowed is that a person causing the death of another by his negligence should not be suffered to escape liability therefor. And whether the damages assessed are awarded according to the culpability of the defendant (as in the employer's liability

act in this state), or according to the pecuniary loss sustained by the family of the deceased (as in the English act), they go in fact, though not in terms, to those to whom the estate of the deceased passes at his death. The fact, therefore, that such damages do not, strictly speaking, constitute assets of the estate of the deceased person, would not seem to be of vital consequence, if we look at substance, rather than form. There can be no doubt that it is and was well understood by street railway companies and by liability insurance companies that damages for death caused by the negligence of the railway companies are recoverable in actions against them therefor. It is obvious that there can be no good reason why a railway company should wish to protect itself against liability for damages when the injury did not result in death, and not against liability for damages for death. Of course, a contract is not to be construed according to the understanding of one party to it. But it is equally obvious, I think, that the matter would present itself in the same light to an insurance company. It seems to me, therefore, that the words in the policy, "against loss from liability to every person who may," etc., should be construed as meaning "liability in respect to every person who may," etc., and as having regard, not to the extent of recovery, or the nature of the remedy, but to the subject of the injury. The application, which is made a part of the policy, begins by saying that the railway company applies for a railway policy. The policy that was issued is entitled "Street Railway Liability Policy." Evidently a railway liability policy was and is a well-known form of insurance. Assuming, as we are bound to do, good faith on the part of the insurer and insured, it is difficult, it seems to me, to believe that, as business men, those in charge of railway and insurance companies could have intended or understood the insurance to have the partial character given to it by the majority of the court. The application goes on to provide that, "if the applicant shall fail to comply with any law, by-law, or ordinance respecting the safety of persons, the policy shall not cover injuries resulting from such failure." There is nothing here to show that death resulting from the failure spoken of was not one of the injuries contemplated. It would be an extraordinary construction to say that the safeguards provided for related to lesser injuries, but not to death. In the statements contained later in the application in regard to persons injured and suits against the road for damages, and apparently required of the plaintiff by the defendant, there is nothing which tends in the least to show that cases of death were in fact excluded or were intended to be excluded in considering the nature of the risk or the liability insured against. The application contains nothing, I think, which, fairly construed, excludes from or does not include in the insurance applied for the liability for damages for death. Neither is there anything in the policy, it seems to me, which requires

a construction of the words describing the risk that will exclude liability for damages for death. Such a liability, as already observed, is a statutory one. But the policy expressly provides that the liability insured against shall include statutory as well as common-law liabilities. Amongst the conditions contained in the policy, and to which the insurance was subject, were the following: That the defendant's liability shall not exceed \$20,000 "for all injuries * * * consequent upon any one accident"; that "the policy shall not take effect unless the premium is paid prior to any accident under which claim is made"; that "the insurance does not cover claims upon which suits shall be commenced after six years from the date of the accident"; that in case of loss covered by other like insurance the company shall be liable only for its pro rata share and shall be subrogated to the plaintiff's rights against any third person; and that immediate written notice shall be given of any accident, and of all claims made by injured persons, with all the information in plaintiff's possession relating to the accident, or any claim made on account thereof. These provisions, which contain the more important conditions, are, to say the least, as consistent with the view that damages for death are included in the risk as with the view that they are not. "Accidents," "injuries," "claims," and "losses" are spoken of without distinguishing between cases in which the accident or injury resulted in death and cases where it did not, or between claims which included damages for death and those which did not. Of course, it may be said that when the risk has once been defined all other provisions in the policy are to be construed as relating to the risk so defined. But the question in this case is, what was the risk that was insured against? and in answering that question the nature of the contract, the provisions contained in the application and policy, and the effect of the construction contended for on the one side and the other, are all, I think, to be taken into account. The effect of the construction adopted by the majority of the court will be to limit the plaintiff's right of recovery in respect to statutory liabilities to cases where a right of action has been given by statute to persons injured, and passes by statute on their death to their executors or administrators. It will exclude a class of cases, equally important, to say the least, in which a right of action has been given to the executors of administrators or to the widow or next of kin to recover damages for the death of a person injured by the negligence of a railway company. Such a construction does not seem to me to be a reasonable one. It is said that personal injuries do not include death. But, as already observed, the matter is one of construction. There is nothing in the words themselves to prevent them from being so construed, if it is apparent that the parties so used them. Moreover, it is provided by the employer's liability act that, if the death is preceded by conscious suffering, or is

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not instantaneous, damages for the death may be recovered by the executor or administrator in the action for personal injuries. St. 1892, c. 260, § 1. The use and construction of the words in the policy as including death, and the liability to loss for damages for death, is therefore warranted by the statute.

For these reasons it seems to me that the ruling was right, and that the judgment should be affirmed.

MR. JUSTICE BARKER concurs in this opinion.

MAJOR v. BURLINGTON, C. R. & N. Ry. Co.

(Supreme Court of Iowa, Jan. 21, 1902.)

[88 N. W. Rep. 815.]

Death by Wrongful Act—Widow's Right of Action.*

At common law a widow cannot maintain an action for damages resulting to her individually from the wrongful killing of her husband.

Same—Survival of Cause of Action—Statute—Parties.

Code, § 3443, providing that all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to same, and section 3444, providing that the civil remedy for wrongful death is no longer merged in the criminal offense, construed in connection with section 3445, providing that such action shall be deemed to have accrued to the personal representative of deceased, confer the right to sue for the wrongful killing of a person exclusively upon the personal representative of such person, and hence do not create any cause of action in favor of the wife or children of the deceased, though they may share in the damages recovered, freed from any claim of creditors, as provided in section 3313.

Same—Application of Employers' Liability Act.

The purpose of Code, § 2071, providing that a railroad company "shall be liable for all damages sustained by any person" in consequence of the neglect or mismanagement of its agents or employees, is to relieve employees from the fellow-servant rule; and hence it does not give a widow the right to sue for damages sustained by her by reason of the death of her husband, occasioned by the wrongful acts of a railroad company.

Appeal from district court, Linn county; H. M. Remley, Judge.

The plaintiff is the widow of Benton E. Major, who, as she alleges in her petition, was killed by the wrongful act of defendant, and she thereby deprived of his love, society, companionship, support, and maintenance, to her damage in the sum of \$10,000, for which she asked judgment. The defendant's demurrer—in effect, that plaintiff could not maintain the action—was sustained. As she failed to amend, her petition was dismissed, and she appeals. Affirmed.

Preston & Moffit and P. W. Tourtellot, for appellant.

S. K. Tracy, for appellee.

J. C. Cook, being interested in a like case, was permitted to file a brief.

*See *Bligh v. Biddeford & S. R. Co. (Me.)*, 22 Am. & Eng. R. Cas., N. S., 805, and foot-note.

Major *v.* Burlington, etc., Ry. Co

LADD, C. J. Can a widow maintain an action for damages resulting to her individually from the wrongful killing of her husband? Were it not for the almost unbroken line of authority to the contrary, little difficulty, we apprehend, would be experienced in vindicating such right, at the common law, upon grounds suggested by many eminent jurists. See *Sullivan v. Railroad Co.*, 3 Dill. 334, Fed. Cas. No. 13,599; opinion of Bramwell, B., in *Osborn v. Gillet*, L. R. 8 Exch. 93, sustained by an article by F. T. Fox in 12 Cent. Law J. 464; *James v. Christy*, 18 Mo. 162; *Cross v. Guthery*, 2 Root, 90, 1 Am. Dec. 61; *Ford v. Monroe*, 20 Wend. 210; *Plummer v. Webb*, 1 Ware, 96, Fed. Cas. No. 11,234. Nearly every decision attempting to accomplish this, however, has met the peculiar misfortune of being overruled. Thus the well-reasoned opinion of Judge Dillon in *Sullivan v. Railroad Co.*, supra, was overturned in 1 *McCrary*, 301, 2 Fed. 447, following *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580, wherein such liability was expressly denied. The right to maintain the action appears to have been assumed, rather than decided, in *Ford v. Monroe* and *Cross v. Guthery*, and was subsequently denied in the same states, in full consideration, in *Green v. Railroad Co.*, *41 N. Y. 294, and *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571. In the last case the court said: "Should damages be demanded in right of the deceased from the injury to him, in the name of his representative, a right would clearly be claimed by the mere representative, which from the nature of things, could never have inhered in the principal for one instant of time. No contract, even, could be made recognizing such a right, and providing for a compensation for the loss of one's life. The contract of insurance upon lives was tolerated, not on the ground that death was a proper subject of pecuniary remuneration, but as a mere wager, which might, if lawful, as all wagers once were, depend as well upon the duration of life as upon any other contingency. Or if a suit should be brought to recover for the mental suffering, loss of society, comfort, support, and protection resulting from the death of another person, we should see at once—so intertwined is the web of human affection, interest, and relationship—that the author of his death, however slight or accidental his default, would be responsible in numberless actions brought on behalf of wives, children, friends, brothers, sisters, and dependents of all degrees, to say nothing for the present of creditors; and for any injury of such incalculable extent writers on jurisprudence, perhaps without strict accuracy, have assigned the awful magnitude of the wrong as the reason why neither court nor jury have ever been trusted by the law with the function of estimating it." In *Osborn v. Gillet*, supra, notwithstanding the able argument of Bramwell, B., in which he pointed out

that *Baker v. Bolton*, 1 Camp. 493,—the case generally relied on,—was only a *nisi prius* decision of Lord Ellenborough, the majority of the court held the action might not be maintained, stating that in not a single instance within the books or memory of man had such a liability been recognized in England. In some of the above cases stress is laid on the allowance of such a right in the civil law, but it is to be noted that this has been repeatedly denied, after exhaustive investigation, by the only tribunal administering the civil law in the country. *Hubgh v. Railway Co.*, 6 La. Ann. 495, 54 Am. Dec. 565; *Hermann v. Railway Co.*, 11 La. Ann. 5. Nor can such action be maintained in admiralty. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358. This court declared in the early case of *Donaldson v. Railroad Co.*, 18 Iowa, 283, 87 Am. Dec. 391, that “at common law no right of action for the recovery of damages existed against one who had caused the death of another.” This was conceded to have been the rule in *Connors v. Railway Co.*, 71 Iowa, 490, 32 N. W. 465, 60 Am. Rep. 814, where it was said to have been based on two grounds: “That the right of civil remedy, when the wrongful act amounts to a felony, is merged in the public offense; and (2) that, the injury to the person being a personal tort, the right of action determines with his death.” The authorities are so uniform and numerous in denying the common-law liability for the instantaneous death of a human being, that, as was remarked in *Brame’s Case*, “It is impossible to speak of it as a proposition open to question.” The decisions will be found collected in 8 Am. & Eng. Enc. Law, 855, and note to *Carey v. Railroad Co.*, 48 Am. Dec. 616. The point was definitely decided in *Hyde v. Railway Co.*, 61 Iowa, 441, 16 N. W. 351, 47 Am. Rep. 820; but, even were the question *res integra* in this court, we should feel constrained to yield to the overwhelming weight of authority denying the right to have existed.

2. It is insisted, however, that the statutes of Iowa have completely abrogated the common-law rule; and it was so said in *Connors v. Railway Co.*, 71 Iowa, 490, 32 N. W. 465, 60 Am. Rep. 814. Section 3443 of the Code reads: “All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.” By section 3444 the right of civil remedy is no longer merged in the criminal offense. If, as said in the case last cited, these statutes abrogate the reasons for the common-law rule, then possibly they carry with them the rule itself. But in connection with their enactment, creating a right which did not exist before, the legislature provided for the remedy in the section following: “Any action contemplated in the two preceding sections may be brought, or the court on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the

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deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived." From this it plainly appears that the cause of actions contemplated in section 3443 is only one deemed "to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived." It is such a one as he might have prosecuted if he had lived. And it was so held in *Mowry v. Chandy*, 43 Iowa, 609, wherein a husband was denied the right to maintain an action for damages resulting to him individually from the negligent killing of his wife; the court saying that "a right of action therefor exists only in favor of the administrator of her estate." Again, in *Hyde v. Railway Co.*, 61 Iowa, 441, 16 N. W. 351, 47 Am. Rep. 820, it was said that "a cause of action which survives only by statute must survive to the person or persons designated by statute." Indeed, it seems to be the general rule that whenever a right is created by legislation, and at the same time a remedy is prescribed, such remedy is part of the right and exclusive. Thus it was declared in *Barker v. Railroad Co.*, 91 Mo. 86, 14 S. W. 281, that "in conferring the right of action, and in providing such remedy, in designating when and by whom suits may be brought, it was, as a matter of course, competent for the legislature to provide and impose such conditions as it might deem proper; and the conditions thus imposed modify and qualify the right of recovery, or form, rather, we think, a part of the right itself, and upon which its exercise depends." To the same effect, see cases following, construing similar statutes: *Stewart v. Railroad Co.*, 83 Ala. 493, 4 South. 373; *Goodwin v. Nickerson* (R. I.) 23 Atl. 12; *Usher v. Railroad Co.*, 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863; *Killian v. Railroad Co.* (N. C.) 38 S. E. 873; *Nash v. Tousley* (Minn.) 8 N. W. 875; *Legg v. Britton* (Vt.) 24 Atl. 1016. Nothing in these statutes indicates a purpose to create a cause of action in favor of wife or children, save as they may share in the distribution of the damages recovered, free from any claim of creditors. See section 3313, Code. But appellant urges that as by section 2071 a railroad company is made liable "for all damages sustained by any person," etc., she may recover. The purpose of that statute, as pointed out in *Hunt v. Railroad Co.*, 26 Iowa, 366, was to relieve railroad employees from the fellow-servant rule, and to enable them to recover for the negligence of a co-employee as for that of the principal. That such damages, in event of death, are recoverable only under the statutes mentioned, appears from *Philo v. Railroad Co.*, 33 Iowa, 47.

Affirmed.

MAGINNIS v. KNICKERBOCKER ICE CO. et al.*(Supreme Court of Wisconsin, Dec. 17, 1901.)*

[88 N. W. Rep. 300.]

Real Estate—Reversion to Vendor upon Breach of Condition.

If a person conveys land to another stipulating that the title shall revert to him upon a failure of such other to fulfill certain conditions specified, a breach of the condition occurs and such person makes re-entry of the property or does something equivalent thereto for the purpose of reclaiming the same pursuant to the terms of the grant, in the absence of any equity preventing the legal effect of such facts the title to such property will thereby become revested in such person as absolutely as it was before such conveyance was made.

Same—Same—Right to Invoke Judicial Remedies.

In the circumstances stated, the grantor, having reclaimed the property, may invoke judicial remedies in respect thereto, pleading his title in general terms the same as if no disturbance thereof had occurred by reason of the grant upon condition.

Same—Forfeiture Prevented by Equitable Construction of Contract.

If a person conveys property to another, coupled with a condition the breach of which will, if taken advantage of, cause the title to revert to him, the condition being to secure the payment of money, or the performance of an obligation the breach of which can be fairly measured in money by some established rule, the particular thing to be done or the particular time of the doing thereof not being made essential and of the very essence of the contract, under some circumstances a court of equity, by an arbitrary rule of construction peculiar to that jurisdiction, may say the parties did not intend the full effect of their language, but purposed to have the condition stand as security for the performance of the obligation or the payment of an equivalent in money.

Same—Same.

By the arbitrary rule referred to, contracts may be judicially made to read contrary to the literal or reasonable meaning of the language thereof, measured by ordinary rules for judicial construction, and then enforced according to the intention of the parties as judicially declared.

Same—Same.

The rule of construction above indicated applies to prevent a forfeiture where the circumstances are such as to fall within the jurisdiction of equity and the person seeking the benefit thereof is not guilty of having willfully or inexcusably violated his obligation.

Same—Reversion to Vendor Prevented by His Inequitable Conduct.

The beneficiary of a condition in the conveyance of property, for the breach of which the title thereto may revert to him, may lose the benefit thereof by conduct rendering it inequitable for him to insist upon the forfeiture as stipulated.

Same—Vendor's Waiver of Forfeiture.

Mere silence is not sufficient to waive a forfeiture; but silence on one side and conduct in good faith relying thereon on the other, whereby such other is placed in such a situation that he will be greatly damaged if the apparent attitude of his conditional grantor be changed effectively, will bind such grantor as a waiver of the benefit of the condition.

Same—Same.

Mere silence will not operate as a waiver of the benefit of a condition in case of an intentional breach thereof, though the conditional grantee incur expense which would operate to his prejudice if the grantor were thereafter permitted to insist upon the forfeiture.

*Maginnis v. Knickerbocker Ice Co***Eminent Domain—Private Railroads.***

The establishment of a railroad as a purely private enterprise cannot be legitimately aided by the power of eminent domain.

Presumption of Consent to Taking of Land by Railroad Not Applicable Where Rights of Parties Defined by Written Instrument.

The doctrine, that if a railroad company takes possession of land for a public way, the owner thereof not objecting, the latter will be presumed to have consented thereto and impliedly agreed to accept a just compensation therefor and consented to rely upon the statutory method of obtaining the same, has no application to a case where the rights of the parties are defined by a written instrument.

Real Estate—Forfeiture—Right of Railroad to Remain in Possession of Land It Could Acquire by Eminent Domain.

If a railway corporation takes possession of land for a private purpose, its right to do so resting in a grant by the owner thereof, and it subsequently loses that right by forfeiture to such owner, it cannot thereafter defy such owner and continue to enjoy his property because it might successfully proceed in good faith to acquire it for a public purpose.

Cassoday, C. J., dissenting.

(Syllabus by the Judge.)

Appeal from circuit court, Racine county; Frank M. Fish, Judge.

Action by Nellie Maginnis against the Knickerbocker Ice Company and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Action to restrain a continuous nuisance. The complaint states, in substance, that plaintiff was the owner in fee simple and in possession of certain lands described, situated in Racine county, Wis.; that defendants constructed a spur railroad track thereon, leading from the main track of the Chicago, Milwaukee & St. Paul Railroad Company southeasterly of said land, in a northwesterly direction to the boundary line thereof and intends to enter upon and permanently occupy said premises for said spur track, and to operate railway freight trains over the same without permission of plaintiff or having first acquired the right to do so. The defendant Knickerbocker Ice Company answered, denying the allegations of the complaint as to the title and possession of the premises in dispute and alleging title and right of possession in itself, and that such possession was exclusive except that the defendant railway company possessed a license to maintain a railway track over the same for the purpose of reaching ice industries operated by said ice company; that the railway track had been maintained and operated continuously for more than three years before the commencement of the action, by said railway company, as a part of its public railway system. The railway company answered substantially the same as the ice company.

On the trial plaintiff admitted that the railway track had

*See *Kansas, etc., Ry. Co. v. Northwestern Coal & Min. Co. (Mo.)*, 20 Am. & Eng. R. Cas., N. S., 593, and note, 614 et seq.; 4 Rap. & Mack's Dig. 453 et seq.; 10 Am. & Eng. Enc. Law (2d Ed.) 1070 et seq.; 18 Cent. Dig., col. 805 et seq.

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been maintained and operated for more than three years before the commencement of the action, but claimed that it was so maintained and operated solely for use of the defendant ice company. The following facts were established by the evidence: December 15, 1893, Frederick Uhen, under whom both plaintiff and defendants claim title, conveyed to Thomas Boyle the 33-foot strip of land across a portion of section 34, town 3, range 19, described in the complaint, out of a tract of land owned by him, for a right of way for a railway track leading from the main track of the Chicago, Milwaukee & St. Paul Railroad to certain ice houses owned by the grantee and his associates. The conveyance was made upon conditions expressed therein as follows: "Provided that said second party inclose said premises herein conveyed with a good, legal and sufficient fence and forever maintain the same, and provide a suitable crossing in said strip at a point to be designated by the first parties, and to maintain gates in the fences at such crossing, and to build and maintain suitable culverts at the points where ditches now cross said premises, then this deed shall remain of full force and effect; but if at any time said grantee shall suffer the above conditions to be broken, then said described premises shall revert back to said first parties, their heirs or assigns." Thereafter Boyle leased to the defendant railway company the center 17 feet of said strip of land and contracted with such company to construct a spur track thereon for the exclusive use of himself and his associates in the operation of their ice industry. A track was constructed accordingly, Boyle and his associates preparing the roadbed and the railway company furnishing the ties and rails and putting the same in place. While such work was in progress, Uhen made complaint to Boyle and others engaged therein, because no provision was being made for putting in culverts. No attention was paid to his complaints other than to suggest to him that culverts were not necessary. Ditches were made on either side of the strip, and the cross drainage ditches, agreed to be preserved by culverts under the track, were connected with such side ditches so that the water would flow through them off from plaintiff's land. There was delay in putting in the farm crossing, but it was finally put in and accepted. Soon after the construction of the spur track the rights of Boyle in the land, by mesne conveyances, became vested in the defendant ice company. The condition in respect to fencing the land was never performed. Uhen made complaint as to that on several occasions, at one time giving notice that the title conveyed by him could be reclaimed because of neglect to build the fence. During the summer of 1899, upon Uhen complaining about the failure to build the fence, he was promised that the premises should be inclosed after harvest time of that year. He acquiesced in that. In November, thereafter, plaintiff became the owner of the land, by conveyance from Uhen, out of which he conveyed the

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premises in controversy. Thereafter, with knowledge of and without protest from Uhen, the defendants fenced that part of such premises leased to the railway company. Thereafter, on January 4, 1900, Uhen went upon the strip of land for the purpose of reclaiming title thereto for nonperformance of the conditions of the deed. He then declared in the presence of several persons the purpose of his entry, and constructed fences across the ends of the strip so as to exclude all comers therefrom. He then conveyed the land to plaintiff, who thereafter removed the side fences of the 17-foot strip, making the entire 33-foot strip a part of her inclosure. The railroad company did not construct, operate or intend the spur track for public use, but established it for the exclusive use of the owners of the ice industry served by it.

At the close of the trial the plaintiff's attorneys requested the court to find facts in accordance with the foregoing, presenting written findings to that effect, which request was refused. A decision was rendered for defendants, the findings of fact being to the effect that the spur track was constructed and operated for public purposes; that the defendant ice company was the owner and entitled to the possession of the premises in dispute; that the railway track was owned and operated by the Chicago, Milwaukee & St. Paul Railway Company, and was on the premises by license of the ice company; that plaintiff was not entitled to any compensation from the defendants for the land or for the use thereof and had not suffered and would not suffer any injury by reason of any acts of the defendants or either of them.

Louis H. Rohr (John B. Simmons, of counsel), for appellant.

James Cavanagh, for respondent ice company.

Thomas M. Kearney, for respondent railway company.

MARSHALL, J. (after stating the facts). The statement of facts shows that, though there was no controversy but that Uhen conveyed the land to Boyle upon conditions subsequent which were breached, and reclaimed the property by a distinct assertion of his rights—so far as a reclaimer thereof was possible under the circumstances—before the conveyance to appellant, it was held that his first grantee was the owner of the property and entitled to recover costs of the appellant. That conclusion was reached upon several grounds which we will consider.

The principal reason suggested, why it was supposed appellant was not entitled to recover, is that a court of equity will not exercise its jurisdiction to declare or aid a forfeiture, but leave the parties to their remedy at law. We are unable to perceive how that principle applies to this case. Appellant did not seek by her suit to reclaim the property in controversy. Her complaint and the evidence in support of it, at every point, repel any such idea. The pleading distinctly declared

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that plaintiff was the absolute owner of the property in dispute and in possession thereof. To establish the truth thereof, proof was made that her grantor, under whom all parties to the suit claimed title, sold the property upon conditions subsequent to the grantor of the ice company; that such conditions were breached, and that such grantor made re-entry for the purpose of enforcing a forfeiture of the property to him, and then made a conveyance thereof to appellant. There can be no question but that such circumstances caused the title conveyed to Boyle to revert to Uhen if his entry was rightful. *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585. The learned circuit judge seems to have supposed, and counsel for respondents now maintain, that the evidentiary facts showing title in appellant, notwithstanding the paper title in the ice company, should have been pleaded. Manifestly, that is a mistake. If one sells and conveys real estate upon condition subsequent, and the title thereto thereafter reverts to him, he may then invoke judicial remedies in respect thereto, pleading his title in general terms the same as if that title were dependent upon any other circumstances. It follows that the judgment appealed from cannot be sustained upon the theory that the action was brought for the purpose of forfeiting the title to the property for nonperformance of the conditions subsequent. It was instituted upon the theory that the title had been already reclaimed and was vested in appellant, and the respondents must stand or fall on the facts in that regard. The court further grounded the judgment on the doctrine that equity will, in some cases, intervene where there has been a failure to perform a condition subsequent, and prevent a forfeiture. Here there was failure again to perceive, as it seems, that the rule mentioned is one invoked to prevent, not to defeat a forfeiture after it has occurred. Unless one keeps in mind the peculiar doctrine of equity in respect to this matter he may be misled by the expressions of courts and text-writers as well. In *Donnelly v. Eastes*, 94 Wis. 390, 396, 69 N. W. 157, 159, this language was used: "If there were a rightful entry for condition broken, so that the estate revested under the terms of the deed, or even if the title revested under the terms of the deed without a re-entry, the court is yet not powerless to relieve the defendant from the consequences thereof." That was said having in mind that, regardless of the express intent of the parties, or the intention inferable from the language used by them, applying strict legal principles thereto, which would effect a reversion of the title, a court of equity may, in some circumstances, hold the real contractual intent not to be according to the literal meaning of such language or within the reasonable scope thereof according to the ordinary rules for the construction of contracts, but that the condition was created as a mere security for the performance of an obligation resting upon the grantee, and give effect thereto in opposition to the expressed intent of the

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parties. By such arbitrary rule of construction the title which would be in the grantor at law is held to be still in the conditional grantee, and so subject to control in equity that the conditional grantor may be compelled to accept compensation in money for the damages suffered by nonperformance of the condition in lieu of an enforcement of his legal rights, the theory being all the way through that there has been no real violation of the contractual intent of the parties. The rule followed in such a case is the one which is supposed to justify courts in saying that parties, in stipulating for the payment of a specific sum as damages for a breach of a contract, did not mean what they said, but intended the sum named to stand as security against loss from such breach, and the recoverable damages therefor to be limited to enough to adequately measure such loss. 2 Story, Eq. Jur. (13th Ed.) §§ 1314, 1315. The process by which courts thus turn a contract which parties say they made into what the law says on the subject was treated at considerable length in *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490. An eminent textwriter is there quoted, in effect, thus: "Parties may contract for stipulated damages at their pleasure, but such damages only as the law says are liquidated, according to the artificial rules which have been adopted to justify courts in saying what parties intended, are in fact to be regarded as such damages." So, as regards a condition subsequent in a deed, regardless of the intention of the parties as indicated by the fair meaning of their language, in certain cases, to prevent the great hardship which would flow from giving effect to the strict legal contractual intent, the court will, by construction dependent upon no reason which can be easily assigned, other than a long line of precedents grounded wholly upon the arbitrary power of the court, say that they intended something else, and by that means, in theory, not take title from the grantor upon condition after it has reverted to him by breach of condition and assertion of his right, but hold that the title still remains in the conditional grantee in harmony with the judicial intention, we may call it, and in that way save his adversary from the consequences of his fault, preserving the title to the property in him notwithstanding such fault, giving the grantor a money consideration for his damages. While, viewing the situation from the legal rights of the parties, relief is granted after forfeiture if at all, as said in *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157, the absurdity is avoided by the arbitrary holding that no such forfeiture has occurred because the parties intended otherwise, regardless of what they said on the subject. The origin of such arbitrary dealing with contracts in violation of the general rule that courts cannot make contracts for parties—can only interpret them so far as to determine what the parties intended, and enforce such intent, not going for their purpose outside the reasonable scope of the language they saw fit to use to express it—is involved in much

obscurity, but it is one of the oldest doctrines of equity jurisprudence, and, although the reason for it is difficult to discover in the light of what judicial remedies are ordinarily supposed to stand for, it has many vigorous defenders. Judge Story, in his work on Equity Jurisprudence (volume 2, § 1316), says: "Law, as a science, would be unworthy of the name if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness and blind confidence and credulity on the one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in any other solemn acts of parties which are constantly interfered with by courts of equity upon the broad ground of public policy or the pure principles of natural justice." That was said by the learned author with reference to situations not involving any fraud, either in fact or in law.

The rule of equity discussed is not one of universal application. It does not extend beyond situations where there is some room for saying the conditions were inserted to stand as security, either for the payment of money, or the performance of some promise, damages for a breach of which are susceptible of ascertainment by some definite rule, and the doing of the particular thing, or the doing thereof at a particular time, was not the principal object secured by the condition. 2 Story, Eq. Jur. (13th Ed.) § 1321; 2 Washb. Real Prop. (5th Ed.) 24; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163; *Donnelly v. Eastes*, supra. Courts and textwriters acknowledge the limitation mentioned to be distinctly marked. This language is used in 2 Story, Eq. Jur. (13th Ed.) § 1321: "It is admitted indeed that where the condition or forfeiture is merely a security for the nonpayment of money, there it is to be treated as a mere security and in the nature of a penalty, and is accordingly relievable. But if the forfeiture arises from the breach of any other covenants of a collateral nature, as for example of a covenant to repair, there, although compensation might be ascertained, * * * yet it has been held that courts of equity ought not to relieve, but should leave the parties to their remedy at law." The subject was discussed at some length in *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662, where it was held that the doctrine, that the consequences of nonperformance of a condition precedent are relievable in equity upon the basis of a money compensation for damages suffered, has no application to a case where the condition was inserted in the contract to secure something other than the payment of money or something having a distinct money value, which was made a principal and essential thing. The case before the court involved the question of whether equity can relieve from the consequences of failure

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to make payment of a renewal premium upon an insurance policy, the contract stipulating the effect thereof to be to render the policy void. It was contended on the one side that the damage to the company by reason of being out of the money a short time was easily ascertainable, and that, as compensation could be made therefor, equity had jurisdiction to say that the insurance company should take that compensation instead of what was its right under the terms of the insurance contract. The decision was adverse thereto, because the condition was not inserted merely to secure payment of money, but to secure prompt payment in accordance with a general policy of the company, and because the injurious consequences of a violation thereof could not be measured by any definite rule.

It is not strictly accurate to say, expressly or by inference, that relief from a breach of condition subsequent can be granted merely because a stipulation for a forfeiture was inserted in the contract as a security. *Nelson v. Stephens*, 107 Wis. 145, 82 N. W. 165. It must stand as security for the payment of money or for the performance of something the breach of which can be definitely measured in money, the doing of the particular thing, or the doing of it at a particular time, not being by the contract expressly made material, or, in other words, of the essence thereof. There is no better illustration of this than the ordinary agreement to pay a certain sum of money at a particular time upon a land contract, coupled with a condition of forfeiture in case of the nonpayment according to the agreement. Ordinarily it is held that the payment of the money is the principal thing. Therefore, equity will give compensation for the breach as to time by the usual rules for measuring loss caused by a breach of an agreement as to time in the payment of money. But if the contract expressly and unequivocally makes time of payment the principal thing the condition was inserted to secure, equity will not relieve from a breach thereof though no real pecuniary loss be suffered thereby by the person entitled to the benefit of the condition. In *Gates v. Parmly*, supra, this language was used: "It would seem that where the condition is security for the payment of money or the performance of any particular act, relief may be granted." The broad statement was unnecessary to the decision of the case in which it was used and may be misleading. Manifestly, courts have not yet gone so far as to hold that equity can relieve from the consequences of the breach of a condition wherever it stands as security for the performance of some act. It cannot if the act itself is of the essence of the contract, the principal thing, and it cannot if the damages caused by the breach are not susceptible of accurate determination by calculation, substantially the same as if the act were the mere payment of money. It is said by Judge Story that the English courts hold that in all cases of forfeiture for the breach of any covenant other than

the covenant to pay rent, no relief ought to be granted in equity unless upon the ground of accident, mistake, fraud or surprise, although the breach is capable of a just compensation. 2 Story, Eq. Jur. (13th Ed.) § 1323. A somewhat broader doctrine than that has prevailed in the courts of this country, care being exercised, as indicated in *Klein v. Insurance Co.*, *supra*, not to substitute a contract of their own for the one the parties made so as to prevent them from having the thing made by them the very essence of their agreement. Probably as valuable a discussion of the scope of the rule, as recognized generally in this country, as can be found, is in the opinion of Redfield, C. J., in *Henry v. Tupper*, 29 Vt. 358. In *Grigg v. Landis*, 21 N. J. Eq. 494, it was held that a court cannot relieve from the consequences of the breach of a condition subsequent that certain improvements shall be put upon granted premises within a specified time, it appearing that time was made by the contract a principal thing; that the condition of forfeiture in such a case is not made merely to secure the making of the improvements, but the making of them within a particular time agreed upon. In discussing the subject the court said: "It is not to be supposed that a court of equity will lightly dispense with contracts made between competent parties, and substitute other agreements more in accordance with variable rules of right and conscience. Such contracts will be enforced according to the intention of the parties expressed and implied, unless it can be shown that thereby some hardship or wrong, not within the presumed contemplation of the parties at the time, will result from such enforcement."

From what has been said it seems clear that the doctrine, that a court of equity may relieve a party from the consequences to him of his breach of a condition subsequent, does not apply to the facts of this case. The condition was not inserted in the deed to secure the payment of money, nor the performance of any act that could be substantially performed by the payment of money damages. The condition was not only to inclose the granted premises by a good and sufficient legal fence, but it was to maintain the same forever. The grantee agreed to put in culverts where the cross drainage ditches were intercepted by the railway roadbed, and put in a suitable crossing where desired by the grantor, with substantial gates in the side fences, and, by inference, to maintain such connecting culverts, crossing and gates, perpetually. There is no rule by which damages for failure to do those things can be accurately measured in money. Moreover, it is manifest that the performance of the acts mentioned was made a principal thing, a matter of the very essence of the contract. The learned court said that no pecuniary loss accrued to the grantor by reason of the default of the grantee, and therefore he would hold that equity would shield the respondents from the effects of the default. The fact that no

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damages accrued to Uhen, which the court could recognize and measure in money, notwithstanding evidence showing a clear breach of the conditions of the deed, should have prevented, rather than called for, an application of the rule mentioned. In *Wafer v. Mocato*, 9 Mod. 112, it was said that, "If a man makes a lease for life upon condition that the lease shall be forfeited if the lessee assigns or aliens it without license, and afterwards the lessee doth assign it without license, that is a forfeiture; and such a forfeiture against which the court cannot relieve, because it is not known what shall be the measure of damages; for the court never relieves but in cases where it can give some compensation in damages, and where there is some rule to be the measure of such damages, to avoid being arbitrary." That was quoted with approval in *Sanders v. Pope*, 12 Ves. 281, and is found often referred to in American decisions. The idea running through all the authorities is that one of the essentials to the application of the doctrine, that a court of equity may relieve from the consequences of a breach of a condition subsequent, is that the damages flowing from the breach must be such that the court can measure the same in money by some established rule.

If the breach of such a condition as those involved in this case could be under some circumstances dealt with by a court of equity, so as to save the wrongdoer from the legal consequences thereof, respondents would still have difficulty, for equity does not use its jurisdiction to save a party in such a case, if his default was willful or inexcusable. 1 Jones, Real Prop. § 732. The doctrine applies that he who seeks equity must apply with clean hands. There must be grounds for equitable relief falling within the scope of the jurisdiction of the court, and the circumstances of the particular situation must be such as to excite a court of conscience to activity. How does this case stand tested by that rule? Neither Boyle nor his grantee, the Knickerbocker Ice Company, constructed or attempted to construct the connecting culverts to preserve the usefulness of the cross drainage ditches. The failure was not caused by any mistake, nor was it the result of mere negligence. The obligation of the deed was intentionally disregarded. Uhen called Boyle's attention to such obligation at the time he was preparing the granted premises for the railroad track. He was informed, in effect, that the culverts would not be put in because the purpose thereof could be served in another way. It is no answer to the neglect to construct culverts to say that the ditches made on either side of the granted premises, and the connection thereof with the cross drainage ditches, served the purpose of the culverts. The grantor was entitled to have just what he bargained for. The agreement to inclose the granted premises was not performed, though Boyle and his grantee, the ice company, were requested time and again to do so, attention being called at

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one time to the fact that the granted premises could be reclaimed for the default in that regard. Though in June, 1899, Uhen consented to a delay in the construction of the fence till after harvest time, upon condition of its being then constructed, no attempt was made to fulfill that condition. In November, 1899, the railroad company inclosed the center 17 feet of the premises, being that portion theretofore leased to it by the ice company. That was not a substantial compliance with the conditions of the deed. On the contrary, it was a willful disregard thereof. It was a distinct declaration to Uhen that the defendants proposed to build the fence in such manner as they saw fit, instead of to inclose the 33-foot strip of land according to the terms of the deed. Such a disregard of the rights of Uhen, in the absence of proof of a waiver thereof on his part, leaves respondents in no situation to be recognized in a court of equity.

It is suggested that Uhen waived performance of the conditions of the agreement, and that his re-entry was not rightful on that account. It is elementary that a person circumstanced as he was may lose the benefit of the condition of his grant by an express or implied waiver thereof. *Andrews v. Senter*, 32 Me. 394; *Ludlow v. Railroad Co.*, 12 Barb. 440; *Guild v. Richards*, 16 Gray, 309; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Sharon Iron Co. v. City of Erie*, 41 Pa. 341; *Grigg v. Landis*, 21 N. J. Eq. 494; *Bonniwell v. Madison*, 107 Iowa, 85, 77 N. W. 530; 1 Jones, Real Prop. § 699. However, the record before us does not disclose evidence to establish a waiver. Mere silence or delay is not sufficient for that purpose any more than to create an estoppel which will present the assertion of a right. That was all there was in this case. Where the benefit of a condition subsequent has been adjudged lost by silence or delay, the person failing to perform relied upon the attitude of his obligee as evincing consent, and incurred expense or placed himself in such a situation by reason thereof that a change of the apparent position of such obligee, if given effect, would seriously prejudice the obligor. *Ludlow v. Railroad Co.*, *supra*, is a good illustration. The plaintiff conveyed land for right of way, to a railway company, upon condition of its road being completed over the premises on or before a particular day named in the conveyance. The condition was not satisfied. The grantor failed to claim the benefit of the condition for two years after the breach. He kept silent during that time as to any intention to claim a forfeiture, and in the meantime, to his knowledge, the grantee actually constructed the road as provided in the grant. The court held that the condition of the grant was waived by the conduct of the grantor, not because of mere delay or silence, but because such conduct induced the grantee to expend money which would be lost if he were allowed to reclaim the property. In *Hubbard v. Hubbard*, *supra*, the conditional grantor received benefits

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from the grant after the breach, keeping silent as to any purpose to insist upon a forfeiture. In *Gray v. Blanchard*, 8 Pick. 284, 292, it was said that mere indulgence alone is never construed into a waiver of a breach of condition. In *Grigg v. Landis*, supra, a breach of a condition as to making improvements upon the granted premises was held waived because the grantee, relying upon indulgence in that there was delay in claiming a forfeiture, and silence as to any intention in that regard, conveyed the property to another, who in good faith made the improvements agreed upon and made payments of the purchase money to the grantor, who received the same, but without knowledge of the breach of the condition.

Further discussion of this branch of the case, or citation of authority, seems unnecessary. There is some ground for saying that the demand for the construction of the fence, long after the breach in respect to the culverts, indicated a purpose to submit permanently to the method adopted by the grantee for conducting water from the cross drainage ditches off from the grantor's land, so that, if such demand had been complied with, all the conditions of the deed would be deemed waived. But the fence was not constructed. The act of building a fence inclosing the center 17 feet of the premises was such a manifestly intentional disregard of the obligations contained in the deed, that the grantor lost no rights merely by not objecting thereto. It has never been held that an open, intentional violation of the obligations of a grant is sufficient in equity, coupled with mere silence on the part of the obligee, to constitute a waiver of strict performance.

The only other ground upon which judgment was awarded to respondents is that the premises in controversy were entered upon by consent of the ice company and the railway track laid down and devoted to public purposes, and that the only remedy of appellant, if she possesses any, is under the statute in respect to the enforcement of the rights of a landowner in case of the occupancy thereof by his consent, express or implied, by a railway company, without its having compensated him therefor. Manifestly, that does not apply to the facts of this case, for two reasons: First, the track in question was laid down and operated for purely private purposes; second, the entry for that purpose is referable to an express contract. There was no intention, at the time of constructing the road, or thereafter, to devote it to any purpose other than the private use of the ice company. The evidence is all one way on that subject. It is absolutely essential to the right to exercise the power of eminent domain that there be a bona fide intention to devote the property, when acquired, to public use. *Railroad Co. v. Morehouse* (Wis.) 87 N. W. 849. The learned circuit court, in an opinion filed, seems to have had that in mind, and comprehended that the spur track in question was a purely private affair, and that, without a change in the attitude of the railway company in respect thereto, it

could not, by adversary proceedings, acquire the right to continue the track if the title to the right of way were found to be in appellant; but the undisputed evidence as to the character of the way was lost sight of in making up the findings. In the opinion it is said, in effect: True, there can be no right of way secured by condemnation in the existing circumstances, but, though the track is now but a private way, it is competent for the railway company to make it a public way and to invoke the power of eminent domain to acquire a property right in the premises for that purpose, and that is sufficient to warrant a court of equity in refusing to aid appellant to secure the undisputed enjoyment of her property. That is the idea we gather from the opinion. The mere statement of the proposition is sufficient to condemn it. It has often been held that if the owner of real estate permits a railway company to occupy the same with a public railroad track, he will be deemed to have consented to take, as compensation for the permanent use thereof, what he can obtain by the procedure laid down by the statutes for the protection of his constitutional rights. But it has never been held, and it would be manifestly absurd to hold, that consent can be obtained, expressly or by implication, for the occupancy of land by a railway company for a private purpose, and the possession thus obtained be referred to as evidence of consent to the occupancy of the property for public purposes, so as to render the doctrine mentioned applicable.

It follows from what has been said that at the time of the commencement of this action appellant was the owner in fee simple and in possession of the premises described in the complaint, and that, under existing circumstances, she was entitled to invoke the jurisdiction of equity to quiet her title thereto against the defendants and to enjoin them from interfering with her possession thereof. The case seems clear upon all the points involved.

The judgment of the circuit court is reversed and the cause remanded with directions to render judgment in favor of the plaintiff according to the prayer of the complaint.

CASSODAY, C. J. (dissenting). I do not understand this to be a bill in equity brought by the defendants, or either of them, to relieve themselves from a forfeiture. On the contrary, I understand it is a bill in equity filed by the plaintiff to have a forfeiture adjudged in her favor, and to enforce the same. The complaint alleges that at the times mentioned the plaintiff was the owner in fee simple and in the possession of the premises described. Each of the answers denies such allegations, and alleges that at all such times the defendant ice company was the owner in fee simple, and in the exclusive possession of such premises. Such was the controversy between the parties. At the close of the testimony the plaintiff requested the court to find that January 4, 1900, Boyle's grantor made re-entry in person upon the land in question,

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and declared the title thereto forfeited for noncompliance with the condition subsequent in the deed, and took possession of the same, and thereupon conveyed the same to the plaintiff. The trial court refused to so find, presumably upon the ground that this court had repeatedly held that "courts of equity will not take jurisdiction of a case for the purpose of aiding or enforcing a forfeiture, but will leave the complainant to his remedy at law." *Clark v. Drake*, 3 Pin. 228; *Lawe v. Hyde*, 39 Wis. 345; *Mills v. Evansville Seminary*, 47 Wis. 354, 2 N. W. 550; *Id.*, 52 Wis. 669, 9 N. W. 925; *Id.*, 58 Wis. 135, 15 N. W. 133; *Hagerty v. White*, 69 Wis. 317, 326, 34 N. W. 92. In my judgment it is not the case of a party in the exclusive possession of land after the breach of condition subsequent, and then filing a bill in equity to quiet the title and protect such possession. To my mind the trial court properly relegated the plaintiff to her remedy at law.

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(Supreme Court of Illinois, Dec. 18, 1901.)

[62 N. E. Rep. 221.]

Speculative Damages—Separation of Voidable Leasehold Estate and Interest in Remainder from Other Land.

Where a person owns a tract of land from which a right of way is taken for a railroad, and also the remainder after a life estate in an undivided one-half of an adjacent tract, and has used the two tracts as one farm, the buildings and improvements being on a part of the latter tract, in condemnation proceedings to ascertain the compensation to be paid him for the right of way evidence of his having a verbal lease of the life estate, together with damages resulting from the right of way separating the two tracts, rendering the use of them as one farm impossible, and depriving him of the enjoyment of the buildings and improvements on the latter tract in farming the former, was properly excluded as being speculative; for the verbal lease was voidable, and it was uncertain when he would enter into the enjoyment of his interest in remainder, and what part of the latter tract, when partitioned, would be awarded to him.

Offer of Evidence.

*An offer of evidence must be construed most strongly against the party making the same.

Eminent Domain—Damages—Separation of Voidable Leasehold Estate and Interest in Remainder from Other Land—Separate Interest.*

Where a person owns a tract of land from which a right of way is taken for a railroad, and also the remainder after a life estate in an undivided half of an adjacent tract, and has farmed the two tracts as one, the buildings and improvements being on the latter tract, in condemnation proceedings to ascertain the compensation to be paid him for the right of way an instruction that the jury, in fixing the compensation, must not take into account the fact that the right of way will divide the two interests of such person in the tracts, but must consider each interest separately, was proper, since the interests in the two tracts were distinct at law.

*As to the right to recover for injury to land not taken, see *Union Terminal R. Co. v. Peet Bros. Mfg. Co.*, 13 Am. & Eng. R. Cas., N. S., 851, and foot-note; 4 Rap. & Mack's Dig. 665; 18 Cent. Dig., col. 1290 et seq.; 10 Am. & Eng. Enc. Law (2d Ed.) 1164.

Conness v. Indiana, I. & I. R. Co**Same—Speculative Damages—Danger from Fire.**

In a proceeding for the condemnation of land for a right of way for a railroad, an instruction that the jury, in assessing damages, should not take into consideration supposed dangers to fire to which defendant's property might be exposed from the operation of a railroad over the right of way, is proper, when the evidence shows that the farm buildings are not near enough to the proposed tracks to be likely to be destroyed by fire from the railroad; damages from such source being then too speculative to be considered.

Same—Elements of Damages—Danger of Stock.

In a proceeding for condemnation of land for a right of way for a railroad, an instruction that the jury, in assessing damages, should not take into account the danger to which defendant's stock or property might be exposed by reason of the operation of a railroad over the right of way, was proper; for the statutes compel railroads to fence their tracks, prescribe equipments for their engines to prevent the setting of fires, and create remedies to the adjacent landowners for injuries to stock and property.

Appeal—Instruction Given at Appellant's Request.

A party on appeal cannot predicate error upon an instruction which he induced the court to give, or to which he consented.

Same—Market Value—Instructions.

In a proceeding for condemnation of land for a right of way for a railroad, it is not error to instruct the jury to assess damages according to the "cash market value," instead of the "fair cash market value," for the two terms are substantially synonymous.

Same—Damages—Division of Land—Separate Interests.

Where a person owns a tract of land from which a right of way is taken for a railroad, and also the remainder after a life estate in an undivided one-half of an adjacent tract, and has used the two tracts as one farm, the buildings and improvements being on the latter tract, in condemnation proceedings to ascertain the compensation to be paid him for the right of way the court properly refused to instruct that the jury, in assessing damages, might consider injuries to the land arising from inconveniences and from a division of the tracts by the right of way; for such instruction was inconsistent with the theory that defendant's interests in the two tracts were distinct and separate.

Instructions—Harmless Error.

The defendant in condemnation proceedings by a railroad for a right of way cannot predicate error upon the court's refusal to instruct that, when the land taken has a greater value in connection with the whole tract than as a separate tract, the measure of damages for the land taken is such greater value, though such instruction was correct, where the jury gave him the benefit of the greater value, and awarded higher damages for the land taken than he deemed himself entitled to.

Same.

The judge's oral directions to the jury as to the form of their verdict in condemnation proceedings for a railroad right of way, after the written instructions had been given, did not constitute error.

Appeal—Review—Findings of Jury in Condemnation Proceedings.

The finding of the jury in condemnation proceedings, unless clearly against the weight of the evidence, will not be disturbed, where the jury had a view of the premises.

Appeal from Lasalle county court; H. W. Johnson, Judge.

Petition by the Indiana, Illinois & Iowa Railroad Company against John W. Conness for the assessment of damages for land taken for a right of way. From a judgment assessing damages, defendant appeals. Affirmed.

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This is an appeal from the county court of Lasalle county in a condemnation proceeding for the right of way of the appellee. The appellant is the owner of the S. W. $\frac{1}{4}$ of section 24, township 31 N., range 2 E. of the third P. M., and is also the owner of the remainder, after the expiration of the life estate of his mother, Mary Conness, of the undivided $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the same section. A number of years prior to this proceeding appellant's father owned the N. W. $\frac{1}{4}$, and by deed conveyed it for life to his wife, Mary Conness, with remainder to the appellant, John, and his brother Benjamin. When this suit was begun and prosecuted all the three last named parties were living; the mother occupying the land, and the two sons living there also. The strip of land sought to be condemned is something less than 100 feet in width, extending the entire width of the S. W. $\frac{1}{4}$ of said section 24 from east to west, and the north side or boundary of said strip is common to the north boundary or quarter section line of said S. W. $\frac{1}{4}$. The strip contains, practically, 5,001 acres of land. The life tenant, the mother, is 76 years of age. The appellant claims that he and his brother, Benjamin, have a verbal lease of the life estate of their mother of the N. W. $\frac{1}{4}$, and had for a number of years prior to the beginning of this procedure been farming the N. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ as one farm, which they term a "stock farm." All the farm buildings, which are numerous and substantial, are situated on the N. W. $\frac{1}{4}$. The only water supply and appliances for use thereof consist of two wells, one for house purposes, and the other about the farm lots; the latter being equipped with pumps, tanks, and conveyance pipes. The natural dip of the land is to the south, and there are several lines of the tile drainage starting from the N. W. $\frac{1}{4}$, and extending south, across the quarter section line, through the S. W. $\frac{1}{4}$ to the natural outlet. By the taking of the right of way in the manner proposed, appellant contends, the farm will be divided into two separate farms; one comprising the N. W. $\frac{1}{4}$, and the other the S. W. $\frac{1}{4}$ less that portion taken by appellee. When the application was filed for this proceeding, appellant filed a cross petition setting up his rights and interests in the lands not taken, and claiming damages on account of such lands. This proceeding is against John W. Conness only, the mother and his brother Benjamin not being parties. The hearing was in May, 1900; and the jury, after hearing the evidence and viewing the land, returned a report and verdict fixing the compensation for the land actually taken (5,001 acres) at \$625, special damages to remainder of the S. W. $\frac{1}{4}$ not taken at \$465, and special damages to the interests of appellant in the N. W. $\frac{1}{4}$ at \$53.33 $\frac{1}{2}$. Upon this verdict, after overruling motions for a new trial and in arrest of judgment, the court entered judgment, from which this appeal is prosecuted.

Eight errors are assigned of record and insisted upon: First. That the court erred in excluding the evidence of a verbal

lease of the life estate of Mary Conness in said N. W. $\frac{1}{4}$ from her to appellant and his brother, and, in connection with that, evidence of damages to appellant by separating his two interests in the two quarters, thereby rendering the farming and carrying on of said two quarters in the manner theretofore done impossible. Second. In not permitting appellant to introduce evidence showing damages to his interest in the N. W. $\frac{1}{4}$ by the separation thereof from the S. W. $\frac{1}{4}$, owned by him exclusively, which he insists, so far as he is concerned, constituted one farm. Third. In requiring that the special damages should be considered and estimated, as to the separate quarter sections, without regard to the interests of the other, or their contiguity. Fourth. In refusing to permit appellant to introduce evidence of the verbal lease of the life estate of Mary Conness to appellant and his brother. This error is included in the first assignment. Fifth. In giving instructions numbered 2, 3, 7, 10, 12, 13, 14, 15, 16, 17, and 18 for appellee. Sixth. In refusing to give instructions 29 and 30 for appellant. Seventh. In instructing the jury orally, after the reading of all the written instructions, in the following language; to wit: "As to the first form of verdict,—the value of the land,—you must, as a matter of course, give something for that. As to the other two forms, if you do give anything for other damages, then you will fill out and use said forms." Eighth. The verdict is contrary to the weight of the evidence.

Trainor & Browne, for appellant.

Cary & Walker and Reeves & Boys, for appellee.

RICKS, J. (after stating the facts). This case has been before this court on appeal from a former hearing, in which the present appellee was appellant, and is reported in 184 Ill. 178, 56 N. E. 402. In the opinion of the court, and with a view to a further hearing of the case, we said (page 180, 184 Ill., and pages 402, 403, 56 N. E.): "The estate in remainder in the northwest quarter was a vested interest, the value of which could be determined; and, if that estate was damaged, we see no good reason why the damages might not be assessed in this proceeding. * * * The lands were already separated as to interest and estate, and the only evidence admissible as to the northwest quarter was concerning defendant's estate therein. If his interest in the northwest quarter was in any way affected by being separated from his other lands, it required careful discrimination and the limiting of the evidence to his interest, and in this respect the court erred. It appeared that the defendant and his mother and brother lived together as a family on the place, and he testified that the lease from his mother was oral to himself and his brother. Counsel on both sides say that it was subject to the statute of frauds and voidable. At any rate, he furnished no basis whatever for the assessment of damages to his share of the lease-

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hold interest, and evidence including it should not have been admitted. Whether the leasing was for a share of the crops, or what the rental was, or the value of the leasehold interest, did not appear in any manner."

The first, second, third, fourth, and fifth errors all relate to the same question, and may as well be considered together. While appellant was upon the witness stand, and without asking him a single question as to the character of his lease, or the length of term he had, or as to the rent,—whether cash or part of the crops,—his counsel made this offer: "Thereupon the defendant, by his attorney, offered to prove by the defendant, John Conness, that this railroad right of way, as laid out, divides up and separates the northwest and southwest quarters of section 24 in township 31, referred to in the testimony in this case; that said two quarters at the time of the beginning of this suit were farmed by the defendant, John Conness; that John Conness and his brother, Benjamin Conness, had, and still have, and for a long time before the commencement of this suit had, a verbal lease of the life interest of the mother, Mary Conness, in said northwest quarter, from her, and were occupying and farming said quarter by virtue of and under said lease; that the putting through of said road and right of way will damage the defendant by separating his two interests in the two quarters (the southwest and the northwest quarters of section 24), thereby rendering the farming and carrying on of said two quarters as one farm impossible in the way that they have been farmed prior to the putting through of said road and right of way,"—to which offer counsel for appellee objected, and the objection was sustained and appellant excepted. Again, without asking a question, the defendant's counsel made the following offer: "The defendant, by his attorney, then offered to prove by said witness that the putting through of said road and right of way will damage the individual interest of said John Conness in said northwest quarter by separating it from the said southwest quarter; that before the commencement of this suit said interest was not separated from said southwest quarter, but was joined to it and farmed in connection with it,"—to which offer appellee's counsel objected, and the objection was sustained. It will be observed that these offers of evidence were in very general terms. Witness was allowed to testify where he lived, and how he had been farming these lands. These rejected offers only added the proposed evidence as to the verbal lease, and supposed damages accruing to him by reason of separating the two quarters. When the case was before us on the former trial, we practically held that the verbal lease of the N. W. $\frac{1}{4}$ for the life of the mother was a voidable lease, and for that reason of such uncertain duration that damages for interfering with the enjoyment of it, as related to the S. W. $\frac{1}{4}$, would be too uncertain, and would enter the field of speculative or imaginary damages, which are not allowed in

this class of cases; and we indicated, as clearly as we could, that some reasonable basis other than the mere existence of such lease, and the exercise of rights under it, must be presented as the basis for any such claim of damages. It is again insisted that, inasmuch as we have found that this interest of appellant in the N. W. $\frac{1}{4}$ was a vested interest, therefore damages must follow. The vested interest that appellant has in that tract is by virtue of the deed of his father, and is to the fee of the land after the expiration of the life estate; and, in so far as that interest extends, appellant has by the jury been allowed the damages to which he was entitled. His insistence that he is entitled to have taken into consideration the facts that upon the north farm are the wells and the buildings that he has been using and enjoying in connection with the south farm, and that by the building of this railroad between the two farms the enjoyment of these things will be interfered with, we cannot accede to. In addition to the uncertainty when he will enter into the enjoyment of his vested estate is the further uncertainty as to whether he will ever have any portion of the lands upon which are the buildings and wells which he now insists are so valuable to the use of the S. W. $\frac{1}{4}$. He is not able to say that upon the death of his mother, and a partition of the lands, and the ascertainment of his particular portion, all these benefits may not be given to his brother. In the partition of the N. W. $\frac{1}{4}$, commissioners would hardly be expected or required, to the detriment of the interests of the brother, to take into consideration the fact that appellant owned 160 acres of land south of and adjoining it; and, if they did, he cannot say but they would give him the west 80, upon which none of these buildings appear to be. Looking at the offers as made, and construing them most strongly against appellant, as it is our duty to do, we are unable to say that they would furnish a basis upon which the character of damages contended for could be established; and, without the evidence contained in such offers, there was nothing in the record to warrant appellant's claim to the damages so contended for.

The instructions complained of in the fifth assignment of errors (being numbered 2, 3, 7, 10, 12, 13, 14, 15, 16, 17, and 18) were predicated upon the evidence in the record, with the offered evidence excluded. A special complaint is made, however, of instructions 4, 12, 13, 15, 17, and 18, upon the ground that they told the jury that, in fixing the compensation to be paid, they must not take into account the fact that the right of way divided the two interests of appellant in the two quarters, but must consider each interest separately and as if standing alone, or as if the other of the two interests belonged to an entire stranger. There was no error in this. In the view that we entertain and have expressed above,—that the interests of appellant, as shown by this evidence, were so distinct and so unlike in character that they cannot, in law, be

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said to have anything in common, then those instructions were in keeping with that view, and were right.

It is further urged as to instruction 14 given for appellee that it excluded from the jury proper elements of damage. In it the jury are told that they "should not take into account any supposed danger to which the defendant's stock, or himself, or his property, might be exposed by reason of the operation of said railroad over said proposed right of way." Appellant says that it shuts out all elements of danger to property, stock, or person from fire, or any of the numerous kindred causes always present where a railroad is in operation, and in support of the position appellant cites *Railway Co. v. Teters*, 68 Ill. 144; *McReynolds v. Railway Co.*, 106 Ill. 152; *Railroad Co. v. McKinley*, 64 Ill. 338; *Railroad Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; and *Railroad Co. v. Hopkins*, 90 Ill. 316. We have examined these cases, and do not think they sustain the views contended for as applicable to this case. The evidence shows that there are no buildings at all on the S. W. $\frac{1}{4}$, and that there are none near enough to this railroad, situated on the N. W. $\frac{1}{4}$, that they are likely to be destroyed by fire from the railroad. In *Jones v. Railroad Co.*, 68 Ill. 380, this court said (page 383): "Investigations like this necessarily embrace a wide range of subjects, and it is hardly practicable to state any inflexible rule for estimating the damages to the landowner. The amount allowed should be sufficient to cover all the actual damage occasioned by reason of the construction of the road, for the land taken, for all physical injuries to the residue, and for all inconveniences of every character actually produced; but nothing should be allowed for imaginary or speculative damages, or such remote or inappreciable damages as the imagination may conjure up, and which may or may not occur in all the future. The increased hazard from fire resulting from the use of steam as a motive power in most cases may be reckoned among the imaginary dangers that may or may not occur, and, in case they do, the law affords a speedy and effectual remedy. No doubt, if the road was constructed so near the owner's buildings as that the danger from fire would be real, it would be an element of increased damage; but where the buildings are at such a distance that the danger is not real, but amounts to nothing more than a mere apprehension, the rule is different." In view of our statute imposing upon railroads the duties of maintaining fences that shall be a protection to stock, and the provisions with reference to allowing fire to escape, the requirements as to the equipments of engines, and the numerous and extensive provisions of the statute in favor of the adjacent landowners in cases of this class of injury, it seems to us that there is no present reason for extending the rule of damages, in such procedure as this, beyond that class of injuries which would be calculated to depreciate the value of the land, with all these laws existing. As, for instance, it might be that,

having a dwelling or a number of dwellings along and so near to the line of the proposed railroad that there would be great danger of fire, and possible loss of life consequent upon such fires, the courts may well hold that in such cases the statutory provisions and safeguards would hardly be sufficient, and that, notwithstanding them, valuable properties would, from such danger, be depreciated in value. *Railway Co. v. Gordon*, 184 Ill. 456, 56 N. E. 810. In *McReynolds v. Railway Co.*, supra, we said (page 156): "The basis upon which the larger amount of damages was estimated was, in part, of the most unreliable and unsatisfactory character,—such as the danger of crossing with teams, and danger of children and members of the family getting hurt, besides the general inconvenience in carrying on a farm divided into two parts by a railroad. The inconvenience of carrying on the farm because of the railroad would be a legitimate item of damage to be considered, although the damage from that source would be largely conjectural, and not susceptible of anything like definite ascertainment; but injury from the other sources of danger above named would be but merely possible. Such merely possible damages do not form a proper basis for the assessment of the amount of damages. It is only such damages that are reasonably probable." This instruction was given under peculiar circumstances. The record shows that it was asked by appellee and marked "Refused," and then submitted to counsel for appellant with this statement by the court: "Do you desire this instruction refused, or do you prefer that it should be given? I will give it if you think best,"—to which appellant's counsel replied: "I don't think that is the law, but I think you had better give it." The court adds that this statement is made from his memory, and not from any note or memorandum made at the time of the trial. We do not think the giving of this instruction was error, but, if it should be, appellant is now estopped from insisting upon it. A party cannot complain of an error which he has himself induced the court to make or has consented to. *Smith v. Kimball*, 128 Ill. 583, 21 N. E. 503.

Appellant in his original brief complained of instructions 4 and 11, and insisted that they erroneously stated the rule of value to be "market value" or "cash market value," when they should have stated "fair cash market value." These instructions were not subject to that criticism, and in his reply brief appellant says that his complaint was intended to be against instructions numbered 2, 10, and 16, and that the giving of those numbers was a mere clerical error. Instruction No. 2 uses the expression "actual cash market value." No. 10 did not attempt to state the rule as to cash value, or define the term "value" at all, but stated that the jury was not to be controlled by any evidence of offers, but that they should find what the "lands would actually sell for if exposed for sale, for cash." No. 16 uses the expression "actual cash

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market value." No. 2 defines what it means by "cash market value," as being "the price which the owner, if desirous of selling, would, under ordinary circumstances surrounding the sale of property, have sold the property for, and a person desirous of purchasing would, under such circumstances, have paid for it." This could mean nothing if it did not mean the fair cash market value. However, in any view of the case, this contention is not supported by authority, but, on the contrary, we have held that "fair cash value" and "actual cash value" mean the same thing, and that both mean the "fair or reasonable cash price for which property can be sold in the market." Insurance Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598.

By the sixth error assigned, appellant insists that instructions 29 and 30 offered by him, and refused by the court, should have been given, and that their refusal was error. Instruction 29 states a correct principle of law, and the rule applicable to ordinary cases of this kind. It is as to the measure of damages, and the vice of it is in the concluding clause, as applied to this case. After stating the rule, the instruction concludes: "In determining this, the jury may consider the injury to the land arising from inconveniences and injuries actually brought about by the construction of the proposed railroad, if any, or incidentally produced by dividing the land, as to water, pasture, and improvements," etc. This instruction could only apply on the theory that appellant's damages were of the same character as applied to each tract of land involved, and was inconsistent with the theory upon which the court permitted the trial to proceed. The very point was that there was no water or improvements on the south 160, and appellant's constant contention was to have the jury consider as elements of damage the cutting off of the south 160 from the water on the north quarter, and from the benefit of the buildings and other improvements, without having to cross the railroad and go through fences to get to them.

The thirteenth instruction is in keeping with the argument and reasoning of the court in Railroad Co. v. Bowman, 122 Ill. 595, 13 N. E. 814, and told the jury that "when the land actually taken is part of a body of land used together as a farm, and that part has a greater value in connection with the whole than as a separate parcel, the measure of damages for such land actually taken will be the fair cash market value of the part taken as a part of the whole,"—in other words, as we understand this, that, if the 5 acres of land which were taken would be more valuable as a part of the farm than simply as 5 acres of land, the jury should give appellant the benefit of the greater value. The evidence shows that the jury did this. The land was shown to be worth from \$90 to \$100 per acre, and the jury allowed \$125 per acre; and, as appellant says in his brief: "As to the finding of compensation for land actually taken, we have no serious complaint to

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make. While it is not consistent with the testimony of the witnesses, at the same time we feel that the witnesses placed their values too high in said land taken, and are not disposed to criticise the finding of the jury in so far." This instruction related wholly to the land taken, and, if appellant received more than he expected and more than he feels that he is entitled to for that land, we will not be warranted in setting aside the verdict simply to cure a mistake of the court.

Appellant's next contention relates to the remarks of the court at the time the jury were instructed. These remarks are set out in the statement of this case, and do not seem to us to rise to the dignity of an instruction. They were such casual remarks as a court ordinarily makes to a jury concerning a verdict that may be somewhat difficult to make up. Here were involved three distinct verdicts, and a word or two from the court often saves much confusion when the jury goes to formulate its finding. All the matters of law that they were authorized to consider were fully incorporated in written instructions, and the remarks made only related to the manner of filling blanks in the instructions. *Kiernan v. Railway Co.*, 123 Ill. 188, 14 N. E. 18; *Railroad Co. v. Wheeler*, 149 Ill. 525, 36 N. E. 1023.

Lastly it is said that the verdict is contrary to the evidence. We do not think so. We have carefully gone over this evidence, and feel, from our examination of it, that the jury sought to be fair between the parties, and to give appellant all that he was entitled to under the law and the evidence, and that they did so. In this class of cases, where the jury is allowed to go and view the premises, and act from their own knowledge as well as from the evidence, we should only feel warranted in setting it aside where it appeared grossly inadequate or grossly excessive. *Railroad Co. v. Bugbee*, 184 Ill. 353, 56 N. E. 386; *Rock Island & P. Ry. Co. v. Leisy Brewing Co.*, 174 Ill. 547, 51 N. E. 572.

The judgment of the county court of Lasalle county is affirmed. Judgment affirmed.

SAN FRANCISCO & S. J. VAL. RY. CO. v. LEVISTON.

(*Supreme Court of California, Oct. 26, 1901.*)

[66 Pac. Rep. 473.]

Alleging Public Use in Eminent Domain Proceedings—Statute.*

Under Code Civ. Proc. § 1238, subd. 4, providing that the right of eminent domain may be exercised "by steam, electric and horse railroads, canals, ditches," etc., "for irrigation, public transportation," etc., a complaint in condemnation proceedings alleging that plaintiff was incorporated to operate a steam railroad for carrying passengers and freight for hire sufficiently alleges a public use, the words "public

*See generally, 7 Enc. Pl. & Pr. 513 et seq.; 18 Cent. Dig., col. 1510 et seq.

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transportation" in the section quoted only referring to canals, ditches, etc.

Pleading—Sufficiency of Description of Location of Road—Statute.*

Under Code Civ. Proc. § 1244, subd. 4, requiring a complaint in proceedings to condemn land for a railroad right of way to show the "location, general route, and termini" of the road, an allegation that "the location and general route of said road are from some point in the city and county of S. or some point on the Bay of S., or the waters discharging into it, in a general easterly direction to the city of A., and from thence in a general easterly and southerly direction to a point in the vicinity of the city of B.," and that "the termini of the road are, respectively, the city and county of S. and the point in the vicinity of B.," is a sufficiently definite statement of the location, general route, and termini.

Judgments—Harmless Error.

Where the judgment in proceedings to condemn land for a railroad right of way erroneously recited that certain allegations not covered by the verdict were admitted in open court, the error was rendered nonprejudicial by the fact that such allegations were conclusively proven.

Right of Way—Necessity—Proof.

Under Civ. Code, § 465, subds. 1, 4, 7, giving railroad corporations power to select the most advantageous routes, to lay out their routes, and to purchase land, etc., as may be required, the necessity of a right of way through private property is conclusively established by the existence of the public use and the fact that the location has in fact been made through the property.

Same—Proper Location—Pleading.*

Under Code Civ. Proc. § 1244, prescribing requisites of a complaint for condemnation of land, no statement that the proposed location of a railroad is compatible with the greatest public good and the least private injury is required.

Eminent Domain—Interest on Award.

Under Code Civ. Proc. §§ 1251, 1253, stating as conditions to judgment of condemnation the payment of "the sum of money assessed," interest cannot be allowed on the amount, nor payment of costs required.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Condemnation proceedings by the San Francisco & San Joaquin Valley Railway Company against George Leviston. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Riordan & Lande, for appellant.

E. F. Preston and Wm. S. Wells, for respondent.

SMITH, C. Appeals from judgment and final order of condemnation in suit to condemn defendant's land. The complaint was demurred to generally, and on the special grounds among others that it is ambiguous, unintelligible, and uncertain in its allegations as to the location, general route, and termini of the plaintiff's road; and also that it does not appear from its allegations that the use for which the property is required is a public use. With regard to the latter point, the allegation of the complaint is, in effect, that the plaintiff was

*See generally, 7 Enc. Pl. & Pr. 513 et seq.; 18 Cent. Dig., col. 1510 et seq.

incorporated for the purpose of constructing and operating a steam railroad "for the carrying of passengers and freight * * * for hire," etc.; and the specific point is that this does not show that it was for "public transportation," as mentioned in subdivision 4, § 1238, Code Civ. Proc. But the clause in which the quoted expression occurs is, we think; intended to qualify only the words "canals, ditches," etc., and has no application to the preceding words. The construction is sufficiently clear from the nature of the qualifying clause; but it is also required by the provisions of the Civil Code, which impose on all railroad corporations the duties of common carriers, and confer upon them the right of acquiring lands, etc., under the provisions of the Code of Civil Procedure. Civ. Code, § 481; Id. § 465, subd. 7.

The other objection to the complaint is equally untenable. The allegations as to "the location, general route, and termini" of the plaintiff's road (Code Civ. Proc. § 1244, subd. 4) are that the plaintiff was incorporated for the purpose of constructing a railroad "commencing at the city and county of San Francisco, * * * and running in a general easterly direction to Stockton, * * * and thence in a general easterly and southerly direction to a point in the vicinity of Bakersfield; * * * that the location and general route of said railroad are from a point in the city and county of San Francisco, * * * or some point on the Bay of San Francisco, or the waters discharging into it, in a general easterly direction to the said city of Stockton, and from said city * * * in an easterly and southerly direction to a point in the county of Kern in the vicinity of the city of Bakersfield; and the termini of said railroad are respectively the city and county of San Francisco and the said point in the vicinity of said city of Bakersfield." The termini specified are the same as those given in the statement of the purpose of the plaintiff's incorporation, and are sufficiently alleged. *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 61, 7 Pac. 123; *City of Pasadena v. Stimson*, 91 Cal. 252, 27 Pac. 604. Nor is there anything inconsistent with the alleged termini in the allegations of the complaint as to "the location and general route" of the road. These refer to the point of commencement of the location or course located, which in the case of any road running easterly from San Francisco—as one of its termini—must necessarily be on the easterly shore of the bay, or on some of the waters discharging into it, and at a point on the general easterly course to Stockton mentioned. The point is not very exactly determined; nor is it necessary that it should be. It is not a terminus of the road, but merely the commencement of its location or course as located.

Another point urged is that the court failed to find on certain issues raised by the complaint and answer. This is not exactly the case, for the court in fact finds that all the allegations of the complaint are true. But it is recited in the

judgment that certain allegations (being all other than those covered by the verdict) were admitted by defendant in open court, and it appears from the bill of exceptions that this in fact was not the case. But it also appears from the bill that on some of these issues evidence was given not only sufficient to justify the findings, but conclusively so; and with reference to these the error of the court in supposing the allegations to be admitted was in no way prejudicial to the defendant. The verdict of the jury determined the ownership of the lands affected by the suit, the value of the land condemned, and the damages accruing to the remaining land of the defendant, and the cost of fencing and cattle guards; thus disposing of all the matters provided for in section 1248, Code Civ. Proc., that were involved.

The remaining issues, or rather those to which the objections urged by the appellant refer, relate to the location of the road, to the necessity of the right of way, and to the compatibility of the location with the greatest public good of the least private injury. As to the location of the road through the land of the defendant, that was definitely shown by the description given in the complaint,—which is not questioned,—and by the verdict, and also by the testimony of the plaintiff's engineer, and the maps put in evidence; and there was no conflicting evidence. As to the location elsewhere, or the location and general course, there was no denial in the answer except as to the termini, which were proved by the plaintiff's engineer, who testified also as to the definite location of the road from Port Richmond (on the bay) to Giant's Station, a point beyond the defendant's land. As to the necessity of the right of way, the existence of the public use and the location through the defendant's land establish the necessity. Civ. Code, § 465, subds. 1, 4, 7; *City of Pasadena v. Stimson*, 91 Cal. 253, 27 Pac. 604. With regard to the compatibility of the location of plaintiff's road with the greatest public good and least private injury, there was no issue. The defendant, indeed, denies such compatibility, but there was no allegation on the point in the complaint; nor was any required (Code Civ. Proc. § 1244); nor was there any evidence. *City of Pasadena v. Stimson*, 91 Cal. 255, 257, 27 Pac. 604.

The remaining objections urged by the appellant are that the judgment did not allow interest on the amount found by the jury, or required the payment of the costs as a condition of the final order of condemnation. It would doubtless be a reasonable provision to require the payment of costs as a condition of condemnation. But we find no provision of the Code requiring this condition to be imposed. Nor is there any provision requiring interest to be allowed from the date of the verdict. The only condition imposed is the payment of "the sum of money assessed" "within thirty days after final judgment," and that "when payments have been made" etc., a final order of condemnation shall be rendered (Code

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Civ. Proc. §§ 1251, 1253), which seems to exclude the idea of any other condition being proper than the one specified.

I advise that the judgment and order appealed from—the former entitled “Preliminary Order of Condemnation,” and the latter “Final Order of Condemnation”—be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from—the former entitled “Preliminary Order of Condemnation,” and the latter “Final Order of Condemnation”—are affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *et al.*, Appts., v.
UNITED STATES, Appellee.

UNITED STATES, Appt., v. SOUTHERN PACIFIC RAILROAD
COMPANY *et al.*, Appellees.

(Argued January 29, 30, 1901. Decided January 6, 1902.)

[22 Sup. Ct. Rep. 154.]

Public Lands—Right to Lands within Conflict Where Grants Conflict by
Crossing or Lapping—Effect of Priority of Location.*

Each of two separate railroad companies to whom by the same act or by acts of the same date grants of land are made, in so far as the limits of their grants conflict by crossing or lapping, takes an equal undivided moiety of the lands within the conflict, and neither acquires all by priority of location or priority of construction.

Same—Same.

The construction by the Southern Pacific Railroad Company of a railroad from San Francisco to the eastern boundary line of California, along the route approved by the joint resolution of January 28, 1870, as authorized by the act of July 27, 1866, making a land grant in aid of its projected line to connect with the Atlantic & Pacific Railroad at such point near the boundary line of California as was deemed most suitable for a railroad to San Francisco, entitles it to an equal undivided moiety in all the alternate sections within the place or granted limits of such road so far as they conflict with the limits of the grant to the Atlantic & Pacific Railroad by that act.

Same—Same—Res Judicata.

A determination in a suit to quiet title by the United States against the Southern Pacific Railroad Company, that such railroad, claiming under the grant of March 3, 1871, took no title to lands within the conflicting place limits of the grant to it under that act and of that made to the Atlantic & Pacific Railroad Company by act of July 27, 1866, inasmuch as the latter road had filed an approved map of definite location, is not a bar to a claim in another suit between the same parties that the Southern Pacific Railroad Company by virtue of the construction of a railroad under the said act of July 27, 1866, had an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to it and to the Atlantic & Pacific Railroad Company by that act, such lands not being the same as those involved in the prior suit.

Cross Appeals from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree affirming a

*The authorities on this subject will be found collected in the opinion.

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decree of the Circuit Court for the Southern District of California in favor of the United States in a suit to quiet title to land. Reversed.

See same case below, 38 C. C. A. 619, 98 Fed. 27.

The facts are stated in the opinion.

Mr. Joseph H. Call for the United States.

Messrs. Maxwell Evarts and L. E. Payson for the Southern Pacific Railroad Company.

MR. JUSTICE BREWER delivered the opinion of the court:

On May 14, 1894, the United States filed in the circuit court for the southern district of California a bill of complaint against the Southern Pacific Railroad Company (hereinafter called the Southern Pacific) and others, seeking to have certain patents canceled and their title quieted to a large body of land, including those described in said patents. Upon pleading and proofs a decree was entered in favor of the United States on June 6, 1898, quieting their title to most of the lands described in the bill. 86 Fed. 962. Cross appeals were taken from such decree to the circuit court of appeals for the ninth circuit, by which court the decree was affirmed on October 2, 1899. 38 C. C. A. 619, 98 Fed. 27. From such decree of affirmance both parties have appealed to this court.

The lands in controversy were within the grant made July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad Company (hereinafter called the Atlantic & Pacific), in aid of its projected line from Springfield, Missouri, to the Pacific ocean, and were situated along that line between the eastern boundary of California and the Pacific ocean. The Southern Pacific claims title to these lands by virtue of the 18th section of that act and its proceedings thereunder, had with the express approval of Congress.

Litigation has heretofore been had between the United States and the Southern Pacific in reference to lands along the line of the Atlantic & Pacific, the result of which litigation will be found in the following decisions of this court: United States v. Southern P. R. Co., 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152; United States v. Colton Marble & Lime Co. and United States v. Southern P. R. Co., 146 U. S. 615, 36 L. Ed. 1104, 13 Sup. Ct. Rep. 163, and Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18. Those decisions are claimed by the government to be controlling of this case on the principle of *res judicata*.

There are therefore two distinct questions presented for our consideration: First, whether the Southern Pacific took any title to these lands by virtue of the act of 1866 or subsequent legislation, and, second, Do the prior decisions of this court control the determination of this case?

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With reference to the first question a further statement of facts is necessary. The act of 1866 chartered the Atlantic & Pacific, empowered it to build a railroad from Springfield, in Missouri, to the Pacific ocean, the description of the latter part of the route being in these words:

“Thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific.”

By the 3d section a grant of lands was made to said company in these words:

“Sec. 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including reserved numbers.”

The company filed its map of definite location in 1872, but never did any work in the way of constructing that part of its road from the Colorado river, that being the eastern boundary of California, to the Pacific ocean. On July 6, 1886, Congress passed an act forfeiting the lands granted to the Atlantic & Pacific, so far as they were adjacent to and conterminous with the uncompleted portions of the road. 24 Stat. at L. 123, chap. 637. By this act the interest of the Atlantic & Pacific in public lands in the state of California was divested and restored to the United States.

On December 2, 1865, the Southern Pacific was incorporated under the laws of California, “for the purpose of constructing, owning, and maintaining a railroad from some point on the bay of San Francisco, in the state of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego to the town

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of San Diego, in said state thence eastward through the said county of San Diego to the eastern line of the state of California, there to connect with a contemplated railroad from said eastern line of the state of California to the Mississippi river."

Section 18 of the act of 1866 reads as follows:

"And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and, in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

On January 3, 1867, the Southern Pacific filed in the Interior Department a map of a route from San Francisco via Mojave to Needles, on the Colorado river. This line from Mojave to Needles is on the same general course and contiguous to that adopted by the Atlantic & Pacific. The Secretary of the Interior refused to accept or approve the map on the ground that this particular part of the line was not authorized by the charter of the Southern Pacific. On April 4, 1870, the legislature of California passed the following act:

"Whereas, by the provisions of a certain act of Congress of the United States of America, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from San Francisco to the Eastern Line of the State of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon, the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress, and all others acts of Congress now in force, or which may hereafter be enacted, the state of California hereby consents to said act: and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privileges hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, hereby confirming to and vesting in

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the said company, its successors and assigns, all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by the said acts of Congress and any act of Congress which may be hereafter enacted." Cal. Stat. 1869, 1870, p. 883.

And on June 28, 1870, Congress passed the following joint resolution (16 Stat. at L. 382):

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the 3d day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land conterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the 3d section of said act."

Along this general line the Southern Pacific constructed its road, as California said, in reference to the grant made to the Southern Pacific by § 18 of the act of Congress of July 27, 1866, that it "hereby consents to said act;" and as Congress, by its resolution, approved the route selected by the Southern Pacific as a route authorized by that act, no one can question that the construction of the road was under such circumstances as entitle the company to the benefit of the grant made by said 18th section of the act of 1866.

By the act of 1866 Congress made grants of land to two different companies, by the 3d section, to the Atlantic & Pacific, and by the 18th section, to the Southern Pacific. The settled rule of construction is that where by the same act, or by act of the same date, grants of land are made to two separate companies, in so far as the limits of their grants conflict by crossing or lapping, each company takes an equal, undivided moiety of the lands within the conflict. Neither acquires all by priority of location or priority of construction. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334; *Sioux City & St. P.*

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R. Co. v. Chicago, M. & St. P. R. Co., 117 U. S. 406, 29 L. Ed. 928, 6 Sup. Ct. Rep. 790; Donahue v. Lake Superior Ship Canal, R. & Iron Co., 155 U. S. 386, 39 L. Ed. 194, 15 Sup. Ct. Rep. 115; Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. Ed. 177, 16 Sup. Ct. Rep. 17.

The question as to the two grants under this act of 1866 was presented to Mr. Justice Lamar, at that time Secretary of the Interior; and his ruling to the same effect appears in a letter of instructions to the acting Commissioner of the General Land Office on November 25, 1887. 6 Land Dec. 349. In that letter he said:

"The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land not of the character excepted by the grant, and within the 10-mile limit, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the common limits of both roads, after the filing of the map of definite location by the Atlantic & Pacific Company.

"The Atlantic & Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic & Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title to a half interest in all such odd sections; and from that moment and by that act the two companies became entitled to equal, undivided moieties in such sections, without regard to the priority of location of the line of the road or priority of construction; the right of each company relating back to the date of the grant. St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112, U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334; Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co., 117 U. S. 406, 29 L. Ed. 928, 6 Sup. Ct. Rep. 790."

As against this, it is contended that Congress could not have intended a road running from the western to the eastern border of California, parallel and contiguous to the Atlantic & Pacific road; that it must have intended a connection between the two roads on the western boundary or border of the state,—especially in view of the fact that the charter of the Southern Pacific contemplated only a line along the western part of the state from San Francisco to San Diego. Whatever doubts there might be in respect to this matter are removed by the action taken by the Southern Pacific and the resolution of June 28, 1870. The railroad company assumed that it had a right under the act of 1866 to locate a line to the eastern boundary of California, and did locate such a line; and filed a map thereof with the Secretary of the Interior; and Congress,

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by the joint resolution of June 28 in effect accepted and approved that line, and declared that the railroad company might construct its road on the route indicated on that map.

Neither is the date of this resolution the time at which the rights of the railroad company arose, as is contended by counsel. No new land grant was contemplated; no substitution of one grant for another, or of one line for another. The obvious purpose was to accept the line proffered by the road as the line intended by the act of 1866, and the grant made by the act of 1866 was recognized as rightfully to be used in aid of the construction of a road along the line suggested by the company.

Neither is it material whether the line indicated on the map filed is to be taken as a line of general route or of definite location, for in fact the road was constructed along that line, "as near as may be," in the language of the resolution, and the road has been accepted by the government.

Neither does the fact that the line of road contemplated by the Southern Pacific's charter, at the time of the passage of the act of 1866, was along the western border of the state, prevent the operation of the grant. It is well settled that Congress has power to grant to a corporation created by a state additional franchises—at least franchises of a similar nature. *Sinking Fund Cases*, 99 U. S. 700, 727, sub nom. *Union P. R. Co. v. United States*, 25 L. Ed. 496, 504; *Pacific Railroad Removal Cases*, 115 U. S. 1, 15, sub nom. *Union P. R. Co. v. Myers*, 29 L. Ed. 319, 324, 5 Sup. Ct. Rep. 1113; *California v. Central P. R. Co.*, 127 U. S. 1, 32 L. Ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *United States v. Stanford*, 161 U. S. 412, 431, 40 L. Ed. 751, 759, 16 Sup. Ct. Rep. 576; *Central P. R. Co. v. California*, 162 U. S. 91, 118, 123, 40 L. Ed. 903, 912, 914, 16 Sup. Ct. Rep. 766.

In *California v. Central P. R. Co.*, 127 U. S. 1, 32 L. Ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, this very grant was before the court; and Mr. Justice Bradley, on page 44, L. Ed. p. 159, Inters. Com. Rep. p. 162, Sup. Ct. Rep. p. 1083, having theretofore narrated the facts in reference to various charters and grants, said:

"An examination of the acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad, at such point near the boundary line of the state of California as it should deem most suitable for a railroad line to San Francisco; and, to aid in the construction of such a railroad line, Congress declared that the company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa pass, by way of Los Angeles, to the Texas Pacific road at the Colorado river (Fort Yuma). The Southern

Pacific Company was not authorized by its original charter to extend its railroad to the Colorado river, as we already know by other cases brought before us, and as appears by the act of the state legislature passed April 4, 1870, which assumed to authorize the company to change the line of its railroad so as to reach the eastern boundary line of the state; thus duplicating the power given to it by the act of Congress. See the state act quoted in 118 U. S. 399, 30 L. Ed. 118, 6 Sup. Ct. Rep. 1133. This state legislation was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress, and that franchise was accepted, and the roads have been constructed in conformity thereto."

We are of the opinion, therefore, that Mr. Secretary Lamar was right in his conclusion that both the grant to the Southern Pacific and that to the Atlantic & Pacific took effect; and being by the same act, so far as there was a conflict, the two companies took equal, undivided moieties of the land.

We pass, therefore, to a consideration of the second question: Do prior decisions of this court control the determination of this case? *United States v. Southern P. R. Co.*, 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Colton Marble & Lime Co.* and *United States v. Southern P. R. Co.*, 146 U. S. 615, 36 L. Ed. 1104, 13 Sup. Ct. Rep. 163, and *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18, are referred to. Those cases were brought by the United States against the Southern Pacific to quiet title to certain lands (but not the lands in controversy here) along the line of the Atlantic & Pacific within the state of California. In the last of these three cases the principle of *res judicata* was invoked and held applicable; and the title of the government to the lands involved was sustained on the ground that the question in controversy had been finally determined in the prior suits. In the opinion filed there was much discussion in respect to *res judicata*; and it was said, on page 48, L. Ed. p. 376, Sup. Ct. Rep. p. 27:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

See also *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 42 L. Ed. 202, 210, 17 Sup. Ct. Rep. 905, 913, in which the rule was thus stated:

"The estoppel resulting from the thing adjudged does not

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depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

It becomes, therefore, important to determine what was decided in the prior cases; and in order to a clear understanding these additional facts must be borne in mind: On March 3, 1871, Congress passed an act (16 Stat. at L. 573, chap. 122) to incorporate the Texas & Pacific Railroad Company, the 23d section of which reads:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

On April 3, 1871, the Southern Pacific filed a map of a route from Tehachapa pass southward by way of Los Angeles, to connect with the Texas & Pacific Railroad at the Colorado river, and subsequently constructed a road on such line. This line crossed that of the Atlantic & Pacific, the general course of the former being north and south, and of the latter east and west. The grants, therefore, to the Atlantic & Pacific by the act of July 27, 1866, and that to the Southern Pacific by the act of March 3, 1871, came in conflict at and near the place of intersection of their lines. The lands in controversy in those suits were lands within the granted limits of both companies at the place of conflict. It was so distinctly stated in the opening of the opinion in the first case referred to:

"The question to be considered is not as to the validity of the grant to the Southern Pacific Company, but only as to its extent. It may be conceded that the company took title to lands generally along its line, from Tehachapa pass to its junction with the Texas Pacific; and the contention of the government is here limited to those lands only which lie within the granted limits of both the Atlantic & Pacific and the Southern Pacific Companies, at the crossing of their lines, as definitely located." p. 592, L. Ed. 1096, Sup. Ct. Rep. p. 155.

Both grants were grants in præsentī, and when the maps of definite location were filed and approved, the grants took effect by relation as of the dates of the acts. Hence, if each company filed a map of definite location, the title of the

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Atlantic & Pacific, relating back to the year 1866, was anterior and superior to that of the Southern Pacific of date 1871; and all the lands within the conflict passed to the Atlantic & Pacific, rather than to the Southern Pacific. To avoid the effect of this conclusion,—a conclusion resting upon well-settled principles of public-land law,—the Southern Pacific contended that no map of definite location was ever filed by the Atlantic & Pacific, or approved by the Secretary of the Interior; but after a full examination of the facts this court held otherwise, summing up its conclusions in these words:

“Our conclusions therefore are that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific ocean was filed by the Atlantic & Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic & Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic & Pacific was retaken by the general government, and retaken for its own benefit and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands.” p. 607, L. Ed. p. 1101, Sup. Ct. Rep. p. 160.

So, in the opinion in the last of the three cases, is this statement of the facts and question:

“The principal contention of the United States is that the lands in dispute are in the same category in every respect with those in controversy in *United States v. Southern P. R. Co.*, 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152, and *United States v. Colton Marble & Lime Co.* and *United States v. Southern P. R. Co.*, 146 U. S. 615, 36 L. Ed. 1104, 13 Sup. Ct. Rep. 163; and that, so far as the question of title is concerned, the judgments in those cases have conclusively determined, as between the United States and the Southern Pacific Railroad Company and its privies, the essential facts upon which the government rests its present claim.

“Stated in another form, the United States insists that in the former cases the controlling matter in issue was, whether certain maps filed by the Atlantic & Pacific Railroad Company in 1872, and which were accepted by the Land Department as sufficiently designating that company's line of road under the act of Congress of July 27, 1866, chap. 278 (14 Stat. at L. 292), were valid maps of definite location; the United States contending in those cases that they were, and the Southern Pacific Railroad Company contending that they were not maps of that character; that that issue was determined in favor of the United States; and that, as the lands now in dispute are within the limits of the line of road so designated, it is not open to the Southern Pacific Railroad Company, in this proceeding, to question the former determination that such maps sufficiently identified the lands granted to the Atlantic & Pacific Railroad Company by the

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act of 1866, and were therefore valid maps of definite location." p. 25, L. Ed. p. 368, Sup. Ct. Rep. p. 18.

And again on page 29, L. Ed. p. 370, Sup. Ct. Rep. p. 20, after a quotation of the 23d section of the act of March 3, 1871, is this declaration:

"The Southern Pacific Railroad Company constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above act of 1871."

So also on page 46, L. Ed. p. 376, Sup. Ct. Rep. p. 26:

"The lands now in controversy are situated opposite to and are conterminous with the first, second, and fourth sections of the Southern Pacific Railroad, as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas & Pacific act of March 3, 1871."

And on page 61, L. Ed. p. 381, Sup. Ct. Rep. p. 32, the conclusion was summed up in these words:

"For the reasons stated, we are of opinion that it must be taken in this case to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Railroad Company—

"1. That the maps filed by the Atlantic & Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866;

"2. That upon the acceptance of those maps by the Land Department the rights of that company in the lands so granted attached, by relation as of the date of the act of 1866; and

"3. That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866 such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain without the Southern Pacific Railroad Company's having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.

"These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below."

Obviously the fact settled by the decisions in those cases was the filing by the Atlantic & Pacific of an approved map of definite location. Upon that the controversy hinged. Such a map having been filed, the title of the Atlantic & Pacific vested as of the date of the act of July 27, 1866; and inasmuch as the Southern Pacific claimed only by a grant of date March

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3, 1871, it took no title. This which is apparent from the foregoing quotations is emphasized by the full discussions in the opinions, as well as by the allegations in the pleadings upon which the cases were tried. That fact, having been determined, must be taken in the present suit as not open to dispute. The Atlantic & Pacific did file a sufficient map of definite location of its line from the Colorado river to the Pacific ocean, and such map was approved by the Secretary of the Interior. Its title, therefore, to the land within the limits of the grant in California, took effect as of date July 27, 1866. No claim of right or title arising only in 1871, and created by an act of that date, could affect its title.

But it was not adjudged in those cases either that the Southern Pacific had no title to any real estate by virtue of the act of 1866, nor that if there was any real estate to which it had any claim or right by virtue of that act, such claim was not of equal force with that of the Atlantic & Pacific. The general statement at the close of the quotation from 146 U. S. 607, 36 L. Ed. 1101, 13 Sup. Ct. Rep. 160, "that the latter company has no title of any kind to these lands," and the similar statement in ¶ 3 of the quotation from 168 U. S. 61, 42 L. Ed. 381, 18 Sup. Ct. Rep. 32, are to be taken as applicable only to the facts presented, and cannot be construed as announcing any determination as to matters and questions not appearing in the records. Of course the decrees that were rendered in those cases are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce; but as to property which was not involved in those suits they are conclusive only as to the matters which were actually litigated and determined. "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action." *Cromwell v. Sac County*, 94 U. S. 351-356, 24 L. Ed. 195-199. "The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided." *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683-687, 39 L. Ed. 859-861, 15 Sup. Ct. Rep. 733-735. The question here presented was not determined in the prior cases, and is whether the Southern Pacific acquired any title to lands other than those involved in those suits by virtue of the act of 1866; and that question, as we have seen, must be answered in the affirmative. Nor is this a mere technical difference between those cases and this. Counsel for the railroad company call the line from Mojave southward via Los Angeles, to connect with the Texas & Pacific, a "branch line," and that eastward from Mojave to Needles, to connect with the Atlantic & Pacific, a

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“main line;” but by whatever name these two lines are called, they were built under the authority of two different statutes, the line from Mojave southward via Los Angeles under the authority of the act of Congress of March 3, 1871,—an act which in terms authorized the building of a road from a point at or near Tehachapa pass, which is in the vicinity of Mojave, southward by way of Los Angeles, to connect with the Texas & Pacific, and gave no authority to build a line eastward from Mojave to connect with the Atlantic and Pacific,—the line from Mojave eastward, under the act of 1866, which authorized the Southern Pacific to connect with the Atlantic & Pacific at or near the boundary of the state. The route which was selected by the company for this line was approved by Congress as authorized by the act of 1866. Hence the one line was built under the authority of the act of 1871, and the other under the authority of the act of 1866.

Our conclusions therefore are that the United States, having become by the forfeiture act of July 6, 1886, repossessed of all the rights and interests of the Atlantic & Pacific in this grant within the limits of California, hold an equal, undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic & Pacific and of that made to the Southern Pacific by the act of July 27, 1866; and that the Southern Pacific holds the other equal, undivided moiety therein. The United States and the Southern Pacific being, therefore, tenants in common of a large body of lands, a partition is necessary. It was suggested by Secretary Lamar, in the letter heretofore referred to, that the Southern Pacific take only every other alternate odd-numbered section. We see no impropriety in such mode of partition, though, under the case as it stands, we can make no order to that effect. In whatever way partition may be made, equity requires that the lands which the Southern Pacific has assumed to sell, and which were excepted by the circuit court from the decree in favor of the United States, and in respect to which they took their cross appeal, must be among those set off to the Southern Pacific, and thus the title of the purchasers be perfected. It is needless, therefore, to consider the merits of the cross appeal of the United States.

It is also unnecessary to determine the rights of the Southern Pacific to lands outside the limits of conflict. It having been adjudged that the Southern Pacific, by the construction of its road eastward from Mojave to Needles, became entitled to the benefit of the grant made by the 18th section of the act of 1866, the adjustment of the grant is properly to be had in the Land Department, subject, of course, if necessary, to further contests in the courts.

The decree of the Circuit Court of Appeals of the Ninth Circuit, affirming the decree of the Circuit Court for the Southern District of California will be reversed, and the case remanded to the Circuit Court, with instructions to enter a

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decree quieting the title of the United States to an equal undivided moiety in all alternate sections within the place or granted limits of the Atlantic & Pacific in California, so far as those limits conflict with the like limits of the Southern Pacific, excepting therefrom those lands in respect to which there has been some prior adjudication, and to dismiss the bill as to all other lands without prejudice to any future suit or action.

**SOUTHERN PACIFIC RAILROAD COMPANY, Plff. in Err., *v.*
ISAAC T. BELL.**

(Argued and Submitted December 5, 6, 1901. Decided January 13, 1902.)

[22 Sup. Ct. Rep. 232.]

Railroad Land Grants—Withdrawal from Settlement—Lands within Indemnity Limits.*

The Secretary of the Interior was not authorized, by the act of July 27, 1866 (14 Stat. at L. 292), making a land grant in aid of the Southern Pacific Railroad, to withdraw from settlement lands within the indemnity limit of such grant in advance of any selections by the railroad company based on ascertained losses in the place limits, in view of the provisions of § 6 that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company as provided in this act," but that the provisions of the pre-emption and homestead laws "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

In Error to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of Fresno county in favor of defendant in a suit to recover real property. Affirmed.

See same case below, 124 Cal. 475, 57 Pac. 388.

Statement by MR. JUSTICE BROWN:

This was a complaint in the nature of a bill in equity filed by the Southern Pacific Railroad Company in the superior court of Fresno county, California, against Isaac T. Bell, praying to be declared the rightful owner of a certain quarter section of land in that county, and that it be adjudged that the defendant Bell holds the legal title to said land in trust for the plaintiff, and requiring him to convey the same to it free of all encumbrances.

The facts of the case, as set forth in the complaint, are substantially as follows: By "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast" (14 Stat. at L. 292, chap. 278), such road being incorporated under the name of The Atlantic & Pacific Railroad Company, there was granted to such railroad company—

"Sec. 3. . . . Every alternate section of public land, not mineral, designated by odd numbers, to the amount of

*The authorities on this subject will be found collected and reviewed in the opinion of the court.

twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, or occupied by homestead settlers, are pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections," etc.

"Sec. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and the Act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

By § 18 of the same act authority was given to the Southern Pacific Railroad Company, incorporated under the laws of California, "to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

On November 26, 1866, the plaintiff accepted the terms and conditions of the charter and grant of July 27, 1866, as above set forth, and on January 3, 1867, duly fixed the general route of its line of road, designating the same by a plat thereof filed in the office of the Commissioner of the General Land Office. This plat and designation having been duly approved and

accepted by the Commissioner and Secretary of the Interior on March 22, 1867, all the odd-numbered sections of land lying within 30 miles of the railroad, as shown upon the plat, were withdrawn from sale or location, pre-emption or homestead entry, and have ever since remained so withdrawn.

Thereafter, and prior to November 8, 1889, the company duly constructed and equipped the entire railroad provided for in said act, and along the line designated upon the plat filed on January 3, 1867, and the road so constructed, except that part which extends from Mojave to the Needles, was duly accepted and approved by the President and Secretary of the Interior.

A certain quarter section of land within the granted limits of the railroad, as constructed and shown on the map, having been granted and otherwise disposed of, prior to the time when the line of the route was designated by the plat filed with the Commissioner of the General Land Office, the quarter section of land in dispute in this case, which was within the indemnity, but not within the granted limits of the road, being more than 20 but within 30 miles on one side of the road as constructed, was selected by the railroad, in lieu of the quarter section above described as having been granted and otherwise disposed of by the United States. The land so selected was at the time the act of July 27, 1866, was passed, vacant and unappropriated public land of the United States, not mineral, to which the United States then had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and such land has ever since so remained, except as it has been affected by the acts of the parties to this suit. The company had not, at the time the selection was made, nor has it since, selected or received lands to the extent or amount earned and acquired by it in virtue of the grant and the provisions of the granted act.

The complaint further alleged that notwithstanding the rights of the company secured to it by the act of July 27, 1866, the United States issued a patent for the quarter section so selected in lieu of the other, to the defendant, who claims the legal title to said land in fee simple and free from any trust or obligation to the plaintiff.

To this complaint the defendant interposed a general demurrer, which was sustained, and the plaintiff having refused to amend his complaint, a final judgment was entered against it and an appeal taken to the supreme court of California, where the judgment of the superior court of Fresno county was affirmed upon the authority of another case against one Wood. 124 Cal. 475, 57 Pac. 388. Whereupon plaintiff sued out a writ of error from this court.

Messrs. Maxwell Evarts and L. E. Payson for plaintiff in error.

Mr. Joseph H. Call submitted the case for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court:

This case involves a priority of right as to certain lands within the indemnity limits of the grant to plaintiff by act of Congress of July 27, 1866, and a patent for the same lands issued to the defendant as a settler under the land laws of the United States.

It presents the single question whether the railroad company had a right, on July 26, 1893, to select the land in dispute as lieu lands, notwithstanding the defendant had nearly one year before and on September 15, 1892, received a patent for the same. This involves the further question whether the lands in dispute were subject to pre-emption and sale after the filing of the plat designating the line of the road; and this turns upon the meaning of the words, "land hereby granted," used in § 6, wherein it is enacted that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act," which language must also be construed in connection with the further proviso in the same section, that the pre-emption act of 1841, the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

There is no dispute that the land "hereby granted" extends to all the odd-numbered sections within the place limits; that is, within 20 miles of each side of the road. The real question is whether it extends to the indemnity lands, 10 miles beyond this limit, so much of which the company was authorized to select in lieu of lands unavailable to it within the granted limits.

The relative rights of railroads and of settlers under these congressional grants, all of which are couched in similar language, have been the subject of much litigation in this court, the main object of which has been to fix the time when the right of the roads to particular lands within both the place limits and the indemnity limits finally attaches as against both prior and subsequent settlers. Although at the last term of this court the question involved in the case under consideration was practically settled in *Hewitt v. Schultz*, 180 U. S. 139, 45 L. Ed. 463, 21 Sup. Ct. Rep. 309, the progressive steps by which the conclusion in that case was reached will show the difficulties which have attended the solution of these questions, and, as we think, indicate the logical necessity of affirming this case. Two objects have been kept steadily in view: First, securing to the railroad the benefit of the lands actually granted; second, protecting, as far as possible, the right of the public to lands not actually granted, or necessary to indemnify the roads for lands which have become unavailable to it within its granted limits, by reason of the fact that

they had been otherwise disposed of prior to the designation of the line of the road.

In the first of these cases, *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551, it was held that the act of June 3, 1856, granting lands to the state of Wisconsin, to aid in the construction of railroads, was a grant in præsentī of lands within the granted limits, and passed the title to the odd sections designated to be afterwards located; but, until such designation, the title did not attach to any specific tracts, and that when the route was fixed the title which was previously imperfect acquired precision, and became attached to the lands as of the date of the grant. There was no question of indemnity lands involved.

In *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634, it was held that a similar grant, though operating in præsentī, did not apply to lands set apart for the use of an Indian tribe under a treaty, and that it was immaterial that they subsequently became a part of the public lands by the extinguishment of the Indian rights. This doctrine was extended in the next case, *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769, to lands within the boundaries of an alleged Mexican or Spanish grant, which was sub judice at the time the Secretary of the Interior ordered withdrawal of lands along the route of the road.

In *Ryan v. Central P. R. Co.*, 99 U. S. 382, 25 L. Ed. 305, the rule laid down in the last two cases was qualified and limited to lands within the place limits, and it was held that, as the lands in *Ryan v. Central P. R. Co.* were within the indemnity, but not within the place limits, "the railroad company had not and could not have any claim to it until specially selected." The land in dispute was within a tract formerly covered by a Mexican claim, which, although sub judice at the date of the act, had been finally rejected as invalid before the railroad company had selected it as part of its lieu lands. When so selected "there was no Mexican or other claim impending over it." This case practically holds that the title to indemnity lands inures to the railroad company only when selection is made.

This view, that the act conferred no rights to specified tracts within the indemnity limits until the grantee's right of selection had been exercised, was subsequently confirmed in *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. Ed. 56, 3 Sup. Ct. Rep. 485, and *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 28 L. Ed. 794, 5 Sup. Ct. Rep. 208, although it had been stated only as a suggestion in *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739, 26 L. Ed. 456.

In *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 201, 1 Sup. Ct. Rep. 336, it was again held that the grant of the place lands was in præsentī, and attached to the sections as soon as a map showing the definite location of the road was

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filed, and that a party who had subsequently entered a portion of the land covered by the grant, and procured a patent for the same, might be required to execute a release of the premises to the company. It was said by Mr. Justice Field, in that case, p. 365, L. Ed. p. 202, Sup. Ct. Rep. 337, that the grant cut off all subsequent claims from the date of this act, with certain exceptions specifically named, and passed the title as fully as if they had been then capable of identification.

The principle of this case was still further applied in *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334, to two conflicting grants, and it was held that as the title to the lands was within the place limits, it related back, after the road was located, to the date of the grant, priority of date of the act of Congress, and not priority of location of the line of the road, giving priority of title. A distinction was drawn in this case between the land within the place limits and land within the indemnity limits, and it was said that in case of the latter neither priority of grant, nor priority of location, nor priority of construction, gave priority of right; but this was determined by priority of selection.

The case of *Buttz v. Northern P. R. Co.*, 119 U. S. 55, 30 L. Ed. 330, 7 Sup. Ct. Rep. 100, is in seeming conflict with *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634, inasmuch as it was held that the grant by act of July 2, 1864 [13 Stat. at L. 365, chap. 217], to the Northern Pacific Railroad, of lands to which the Indian title had not been extinguished, operated to convey the fee to the company subject to the right of occupancy by the Indians; but the case is distinguishable, as there was in the 2d section of the act a proviso that the United States "should extinguish as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands falling under the operation of this act, and acquired in the donation to the road." The prior case was not cited in the opinion.

The conclusions to be deduced from these cases are—

(1) That as to lands within the primary limits, the grant takes immediate effect, and attaches to particular lands when the map of definite location is filed; that the Secretary of the Interior may, upon the filing of such map, give notice of a withdrawal from sale of all the odd-numbered sections within the granted limits, and that the title so acquired by the railroad company relates back to the date of the grant, and takes precedence of all titles subsequently acquired, except those specifically named.

(2) That to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained and the company has exercised its right of selection, with perhaps some rare exceptions. See *St. Paul & P. R. Co. v. Northern P. R. Co.*, 139 U. S. 1, 35 L. Ed. 77, 11 Sup. Ct. Rep. 389.

The last case upon this subject is *Hewitt v. Schultz*, 180 U. S. 139, 45 L. Ed. 463, 21 Sup. Ct. Rep. 309, which involved the title to a quarter section of land in North Dakota within the indemnity limits that is (as applied to territories), between the 40 and 50 mile limits of the Northern Pacific Railroad land grant. Plaintiff Hewitt claimed title as a settler under the pre-emption laws; defendant as a purchaser from the railroad company, under its grant of July 2, 1864. 13 Stat. at L. 365, chap. 217. The 3d and 6th sections of this act were, except as to the name of the railroad and a few immaterial words, identical with the corresponding sections of the Atlantic & Pacific act of July, 1866.

On March 30, 1872, the railroad company filed a map of its general route through the territory of Dakota, and the local land office was thereupon directed to withhold from sale or location all the odd-numbered sections within the place limits of 40 miles, as designated on such map. On June 11, 1873, the company having filed a map of the definite location of its line, the local land office was directed to withhold from sale, or entry, all the odd-numbered sections within the 50 mile limits. This action was taken pursuant to the practice at that time prevailing in the General Land Office.

The land in dispute was more than 40, but within 50, miles of the line of definite location; that is, was within the indemnity limits, and the controlling question in the case was whether it was competent for the Secretary of the Interior to withdraw the odd-numbered sections within such indemnity limits; that is, between the 40 and 50 mile limits.

Hewitt settled upon the land April 10, 1882, more than a year before the withdrawal was made, and it was not until March 19, 1883, that the railroad company filed in the local land office its selection of land, embracing the land in dispute within the indemnity limits.

On April 4, 1883, Hewitt submitted his final proofs for the land, tendered the price, and demanded a patent; but his proof was rejected on the ground that the land had been withdrawn from entry under the act of July 2, 1864. Hewitt appealed to the Commissioner of the General Land Office, who affirmed the decision of the local land office, October 5, 1883. He was ousted of his possession the following year by the defendant Schultz, who had taken a deed from the railroad company. On August 15, 1887, the order of withdrawal of the indemnity lands was revoked, and, upon a review by the Commissioner of the General Land Office of his former decision, the ruling of the local land office was set aside, Hewitt's final proofs admitted, and the selection by the railroad held for cancellation. The company appealed from the decision in favor of Hewitt to the Secretary of the Interior, who affirmed the decision of the Commissioner, and a patent was issued to Hewitt, June 22, 1895.

It was contended upon the argument in this court that the

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words "the odd sections of land hereby granted," used in the 6th section, referred to the lands described in the "1st" (3d) section of the act; that is, to those within the place limits, which were free from pre-emption and other claims, and unappropriated prior to the definite location of the road; and that, as to "all other lands on the line of said road, when surveyed," the act expressly declared that the pre-emption and homestead acts should extend to them; "that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road which were unappropriated when the line of the railroad was definitely fixed; and that if at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40 mile and within the 50 mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits."

The court, treating the question as one of grave doubt, based its views largely upon the practice of the Land Office since 1888, and of the opinions of Secretary Lamar in the *Atlantic & P. R. Co.*, 6 Land Dec. 84, and of Secretary Vilas in *Northern P. R. Co. v. Miller*, 7 Land Dec. 100. The opinion of Secretary Lamar indicated that some of his predecessors had assumed that the power to withdraw lands within the indemnity limits could be exercised upon a definite location of the railroad before the loss in the place limits had been ascertained, but treating it as an original proposition, he thought the words of the act, "that the odd-numbered sections of land hereby granted shall not be liable to sale, or entry, or pre-emption," indicated clearly the legislative will that none other should be withdrawn than the odd-numbered sections within the granted limits. Mr. Secretary Vilas, considering the same subject, said: "In my opinion,—and it is with great deference that I present it,—the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits and land in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the supreme court, and it is sufficient to state the well-settled rules upon this subject."

The same question arose in *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, and in *Northern P. R. Co. v. Ayers* [24 Land Dec. 40], wherein Secretaries Smith and Francis expressed their concurrence in the views announced by Secretaries Lamar and Vilas.

The court rested its decision largely upon this concurrence

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of views and long-continued practice of the Land Department, and summed up its opinion in the following words: "If this were done" (that construction overthrown), "it is to be apprehended that great, if not endless, confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. . . . If the practice in the Land Department could, with reason, be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the courts, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864."

It is attempted to distinguish the case under consideration from that of *Hewitt v. Schultz*, by the fact that the land in controversy in this case is within the indemnity limits of a grant to a railroad passing through a state, and within the department's withdrawal of a 30-mile strip under the 6th section of the act, while the land in the *Hewitt Case* fell within the indemnity limits of the grant within a territory, and was beyond the 40-mile withdrawal, and was not withdrawn from sale by the 6th section, but was expressly declared to be still subject to the operations of the pre-emption laws. It is true that the lands withdrawn in that case lay within a territory and outside of the 40-mile strip required to be surveyed, while in this case the withdrawal of all the lands within the 30-mile strip operates as a withdrawal of all lands within the indemnity, as well as within the place limits, because the line ran through a state instead of a territory. But the real question is not whether the indemnity lands lay within or beyond the 40-mile limit, but whether the withdrawal can operate upon indemnity lands at all. It makes no difference in principle whether the indemnity lands are within or beyond the 40-mile limit, which is not a limit of withdrawal, but of survey, and the whole argument in *Hewitt v. Schultz* is directed to the question whether it is within the power of a Secretary of the Interior to withdraw indemnity, as well as place lands from settlement. The quantity of lands to be surveyed seems to have been arbitrarily fixed by Congress, with little attention to the actual limits of the grant, so as to include all lands within 40 miles of each side of the railroads, that is, 10 miles beyond the indemnity limits within the states, but 10 miles inside of those limits within the territories; but the question of withdrawal is not necessarily dependent upon the question of survey, and the fact that in that case the indemnity lands were beyond the 40-mile limit was an incident, rather than a dominant fact. As said by Mr. Secretary Lamar: "It is manifest that the said act gave no especial authority or direction to the executive to withdraw said lands, and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior and in the ex-

ercise of his discretion." The power of the Secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant. It was said by Secretary Smith to have been exercised for many years, "but the right of this asserted power on the part of the executive is involved in obscurity." *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, 88.

That the object of § 6 was to direct a survey, and not a withdrawal of lands within the 40-mile strip, seems to have been the opinion of this court in *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334, in which Mr. Justice Miller, delivering the opinion, says, p. 732, L. Ed. p. 876, Sup. Ct. Rep. p. 341:

"The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or anyone for it. Was there a vested right in this company, during all this time, to have, not only these lands, but all the other odd sections within the 20-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation, and forbidden to cultivation?"

"It is true that in some cases the statute requires the Land Department to withdraw the lands within these secondary limits from market, and in others, the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

"It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands as selected."

If the command of the statute were to withdraw from the market, instead of survey, all odd-numbered sections within the 40-mile strip, the position of the railroad company in this case would be impregnable; but as the withdrawal only extends to the lands "hereby granted," we must look elsewhere to ascertain the meaning of those precise words. There is

good reason for withdrawing lands within the place limits, since these lands already belong to the railroad company, as soon as they are identified by the location of the line, while lands within the indemnity limits may never be required at all, and in most cases are required only to a limited extent. Undoubtedly the company acquires title to both classes of land by the 3d section of the granting act; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words "hereby granted" evidently refer to the former.

Treating this case as a reargument of the question involved in *Hewitt v. Schultz*, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of §§ 3 and 6. By the former there is "hereby granted . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state." These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semicolon, the meaning, perhaps, would have been clearer. But there follows another clause, that "whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections," etc. There is here a clear distinction between the lands granted in *præsent* in the first clause, and lands to be thereafter selected by the company, whenever the deficiency in the granted lands shall be ascertained.

The 6th section carries out the same idea. It requires a survey of 40 miles in width on both sides of the entire line, whether passing through states or territories. This would include only the granted or place limits within a territory, but within a state would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Department, and for the purpose of preventing lands granted to the railroad company from being taken up by settlers, before the com-

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pletion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the *Atlantic & P. R. Co.*, 6 Land Dec. 84: "Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken." But as the power to withdraw extends only to the "lands hereby granted" and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon § 3 to determine what are the lands "hereby granted."

Now, as already observed, there is a clear distinction in § 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. It is true that, prior to this selection being made, many of these indemnity lands may be taken up, and an insufficient amount left for the railroad (and we do not deny the force of the dissenting opinion in *Hewitt v. Schultz* in that connection), but we think this possibility serves rather as a basis for a further action by Congress, such as was made in the *Northern Pacific* case by the joint resolution of May 31, 1870 (16 Stat. at L. 378), than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require. It was said by Secretary Lamar in the case of the *Atlantic & P. R. Co.*, 6 Land Dec. 84, 87: "As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits, and being able to find sufficient to indemnify the company among the odd-numbered sections within a further limit of 10 miles. Here the interest of the company was so remote and contingent, being a mere potentiality, and not a grant, that Congress declined to order a withdrawal for the benefit of the same, or even a survey within the territories." In view of the constant trend of population toward the western territories, it is a serious matter to withdraw these enormous tracts from settlement and hold them, as it were, in mortmain against the protest of those who stand ready to enter upon and possess them.

It becomes still more serious when, as in this case, there was a delay of twenty-seven years between the granting act and the act of selection. It seems intolerable that a settler, who had entered and paid for lands in good faith, should be liable to an ouster after a possible lapse of twenty-seven years, when the very improvements he may have put upon the lands might be the reason for their selection by the company.

We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the

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Interior of the indemnity lands, that such lands remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company.

The judgment of the Supreme Court of California is therefore affirmed.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood,
Appts., v. CINCINNATI, NEW ORLEANS, & TEXAS PA-
CIFIC RAILWAY COMPANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood,
Appts., v. LOUISVILLE & NASHVILLE RAILROAD COM-
PANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood,
Appts., v. LOUISVILLE, HENDERSON, & St. LOUIS
RAILWAY COMPANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood,
Appts., v. CHESAPEAKE & OHIO RAILWAY COMPANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood,
Appts., v. SOUTHERN RAILWAY COMPANY in Kentucky.

(Argued January 7, 8, 1901. Ordered for Reargument March 25, 1901.
Reargued November 11, 12, 1901. Decided January 6, 1902.)

[22 Sup. Ct. Rep. 165.]

Whether Repeal of Statute Making Recommendation of Commission
Condition Precedent to Indictment for Charging Unlawful Rates.

No repeal of the provisions of Ky. Gen. Stat. 1894, § 819, that prosecution by indictment of railroad companies for charging unlawful rates shall be had only on recommendation or request of the railroad commission, and also for an action in the name of the commonwealth on information filed by the board of railroad commissioners, was effected by Ky. act March 10, 1900, providing for the fixing of rates by such commission, although, while repeating many of the provisions of the section, it omitted these provisions.

Injunction against Action by Commission.*

An injunction against action by the Kentucky railroad commission cannot be had on suit of railroad companies before any rates are fixed by the commission, as the duty of enforcing its rates rests on the commission, and the remedy of the railroad companies by the ordinary processes of law is adequate.

Appeals from decrees of the Circuit court of the United States for the District of Kentucky granting injunctions against railroad commissioners to prevent them from taking action under a Kentucky statute. Reversed, with direction to dismiss.

See same case below, 103 Fed. 216.

*See generally, 6 Rap. & Mack's Dig. 1152 et seq.

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Statement by MR. CHIEF JUSTICE FULLER:

These are appeals from the final decrees of the circuit court of the United States for the district of Kentucky, perpetually enjoining Charles C. McChord and others, railroad commissioners of the state of Kentucky, from doing any of the things required by, or from taking any action whatever against complainants under, a certain act of the general assembly of the commonwealth of Kentucky, approved March 10, 1900, which is entitled and reads as follows:

“An Act to Prevent Railroad Companies or Corporations Owning and Operating a Line or Lines of Railroad, and its Officers, Agents, and Employees, from Charging, Collecting, or Receiving Extortionate Freight or Passenger Rates in this Commonwealth, and to Further Increase and Define the Duties and Powers of the Railroad Commission in Reference Thereto, and Prescribing the Manner of Enforcing the Provisions of this Act and Penalties for the Violations of its Provisions.

“Be it enacted by the General Assembly of the Commonwealth of Kentucky:

“Sec. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected, or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employee of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments, or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is or has been guilty of extortion, said commission shall make and fix a just and reasonable rate, toll, or compensation which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered. The rate, toll, or compensation so fixed by the commission shall be entered and be an order on the record book of their office, and signed by the commission, and a copy thereof mailed to an officer, agent, or employee of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof charge, collect, or receive a greater or higher rate, toll, or compensation for like services thereafter rendered than

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that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent, or employee shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense, in any sum not less than \$500 nor more than \$1,000, and upon a second conviction, in any sum not less than \$1,000 nor more than \$2,000, and for third and succeeding convictions, in any sum not less than \$2,000 nor more than \$5,000.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent, or employee shall have jurisdiction in all prosecutions against said officer, agent, or employee.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the state, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

All the bills sought the same relief, and their averments, excepting those in respect of alleged contracts with the state in relation to rates set up in the bills of the Louisville & Nashville Railroad Company and of the Cincinnati, New Orleans, & Texas Pacific Railway Company, were in substance the same.

The act of March 10, 1900, was set out in full, its provisions recapitulated, and complainants' view of the legal effect thereof given. The 3d paragraph was: "All of your orator's rates charged, collected, or received within the state of Kentucky are just and reasonable, and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skilful manner."

It was then averred that it was the duty of the railroad commission to see that the laws relating to all railroads, except street, were faithfully executed, and to exercise a general supervision over the railroads of the state; that its functions were administrative; that it was not established as a court; and that under the state Constitution it could not be permitted to exercise judicial powers. That all common carriers were subject only to the requirement that their rates should be just and reasonable, and they were in case of controversy entitled to have the judgment of the courts on that question;

but that the act referred to singled out railroad corporations, and deprived them of any opportunity to have a judicial determination of the reasonableness of their rates when disputed, substituted the nonjudicial determination of the railroad commission, and subjected them to penalties, there being no infliction of penalties provided as to other common carriers. That if defendants be permitted to proceed under the act, each complainant "will be compelled to charge the rates fixed by them, without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property, and, in substance and effect, of its property itself, without due process of law, and will also be denied the equal protection of the laws, in violation of § 1 of article 14 of the Amendments to the Constitution of the United States."

It was further averred that the act was in conflict with clause 3 of § 8 of article 1 of the Constitution of the United States, giving Congress the exclusive power to regulate commerce among the states, and with the acts of Congress in that behalf.

The bills then continued:

"And defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the state of Kentucky, for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and unless restrained by the order of this court defendants will proceed at once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is therefore null and void; and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the state of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense, and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's con-

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tract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great and irreparable wrong and injury, and to a vast multiplicity of prosecutions and actions in the courts of said state.”

The cases were disposed of on demurrer.

The Constitution of the state of Kentucky provided:

“§ 209. Railroad Commission—Number—Qualifications—Powers—Election—Term of office—Removal of.—A commission is hereby established, to be known as ‘The Railroad Commission,’ which shall be composed of three commissioners. During the session of the general assembly which convenes in December, 1891, and before the 1st day of June, 1892, the governor shall appoint, by and with the advice and consent of the senate, said three commissioners, one from each superior court district as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in 1895, and every four years thereafter, the commissioners shall be elected, one in each superior court district, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year next preceding his election. Any vacancy in this office shall be filled as provided in § 152 of this Constitution. The general assembly may, from time to time, change said districts so as to equalize the population thereof, and may, if deemed expedient, require that the commissioners be all elected by the qualified voters of the state at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier, company, or corporation, or of any firm or association conducting business as a common carrier, or in anywise peculiarly interested in such company, corporation, firm, or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation as now conferred, prescribed, and allowed by law to the existing railroad commissioners. The general assembly may, for cause, address any of said commissioners out of office by similar proceedings as in the case of judges of the court of appeals; and the general assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor.”

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“§ 218. Penalty for charging more for short than long haul—Power of commission.—It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance; provided, That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this state may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state may be relieved from the operations of this section.”

The following are sections of the General Laws of Kentucky of 1894:

“§ 816. Extortion—What is.—If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion.

“§ 817. Discrimination—What is.—If any corporation engaged in operating a railroad in this state shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

“§ 818. Preference or advantage forbidden—Rules defining same—Quantity of freight.—It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage.

“§ 819. Penalty in damages for extortion, discrimination, preference—Jurisdiction—Duty of commission—Limitation.

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—Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than \$500 nor more than \$1,000; and upon a second conviction, in any sum not less than \$500 nor more than \$2,000; and upon a third conviction, in any sum not less than \$2,000 nor more than \$5,000. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offense, which shall be prosecuted by indictment or by action in the name of the commonwealth, upon information filed by the board of railroad commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the railroad commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed or the cause of action shall have accrued.

“§ 820. Long and short haul over same road—Penalty—Jurisdiction of courts—Duty of commission.—If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor, and fined not less than \$100 nor more than \$500, to be recovered by indictment in the Franklin circuit court or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the ground of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the pro-

visions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted.

“§ 821. Three commissioners—Duties.—There is established a department in the state government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the state. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum.”

“§ 826. Rates from foreign points to be examined by commission—Duty of commission.—Said commission shall examine all through freight rates from points out of this state to points into this state; and whenever they find that a through rate charged into or out of this state is excessive or unreasonable or discriminating in its nature, they shall call the attention of the railroad officials in this state to the fact, and to urge them of the propriety of changing such rates. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission and appeal to it for relief, and they shall receive upon application the services of the attorney general of this state and into the condition, management, and all other matters concerning the business of railroads in this state, so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employees, comply with the laws of the state; and whenever it shall come to their knowledge or they shall have reason to believe that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violations.

“§ 827. Examination of officers and employees by commission—Penalty for contempt.—They shall have the power to examine under oath any person, or the directors, officers, agents, and employees of any railroad corporation doing business in this state, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue subpoenas for the attendance of witnesses, and to administer oaths; and any person who shall neglect or refuse to obey the process of subpoenas issued by said commission, or

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a railroad company, but the question of jurisdiction does not seem to have been raised. The case was considered on its merits, and the bill directed to be dismissed. Mr. Chief Justice Waite, speaking for the court, among other things, said: "As yet the commissioners have done nothing. There is, certainly, much they may do in regulating charges within the state, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

In *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 482, 41 L. Ed. 518, 524, 17 Sup. Ct. Rep. 161, 165, the general rule was stated and applied, and Mr. Justice Harlan, who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

The rule was also applied by Mr. Justice Field in *Alpers v. San Francisco*, 32 Fed. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. . . . The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

In *Southern Pac. Co. v. California Railroad Comrs.*, 78 Fed.

236, the law of California provided that the commissioners might "enforce their decisions, and correct abuses through the medium of the courts;" and, in substance, that after the rate was made by the commission, a copy of the order should be served on the corporation affected thereby, and that twenty days thereafter the rate should take effect. A bill was filed before the twenty days had expired; and Mr. Justice McKenna, then Circuit Judge, held that it was the duty of the commissioners to enforce the rate, and that an injunction would lie. The railroad commission had made an order reducing the grain rates of the company 8 per cent., and had passed a resolution declaring that its general charges were 25 per cent. too high, and that "this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force before January 1, 1896." The court enjoined the enforcement of the 8 per cent. reduction, which had already been made, but declined to restrain the 25 per cent. reduction, because no decisive action had been taken.

Reading the various sections of the General Statutes of Kentucky, set forth in the statement preceding this opinion, as in *pari materia* with the act of March 10, 1900, which should be done, since they are parts of one system, having the same general objects in view, we think it apparent that the duty devolves on the commission to enforce the rates it may fix under the latter act. By § 816 extortion was defined to be charging more than a just and reasonable rate. Section 817 defined unjust discrimination, and § 818 forbade undue or unreasonable preference.

Section 819 denounced the same penalties on conviction of the offense of extortion, or of unjust discrimination, or of unreasonable preference, and provided for prosecution by indictment, or by action in the name of the commonwealth, on information filed by the board of railroad commissioners; that the railroad companies should be liable in damages to the party aggrieved; and also that prosecution by indictment should only be had on the recommendation or request of the railroad commission.

By § 829 the commission was empowered to hear and determine complaints under §§ 816, 817, and 818, and to enforce their awards in the courts.

The duty was imposed on the commission to initiate indictments under § 820 for charging greater compensation, in the aggregate, for a shorter than for a longer haul.

Section 821 made it the duty of the commission to see that the laws relating to railroads should be faithfully executed, and to exercise a general supervision over the railroads of the state.

So that unless the act of March 10, 1900, operated to repeal the provisions of the prior law, by withdrawing from the commission the duty of enforcing the rates it might fix, it was its duty so to do, and indictments were to be found at its instance.

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Section 816 reads thus: "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track or upon any track it has control of or the right to use in this state, it shall be guilty of extortion."

In *Louisville & N. R. Co. v. Com.*, 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129, this section was considered. The court held that the section could not be enforced as a penal statute for want of certainty, and said:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

"The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

"That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

The court referred to and quoted from *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247; and *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443, in which it was held under a similar statute that the want of certainty in lack of reference to a standard under its 1st section was obviated by its 8th section providing for the making by the railroad and warehouse commissioners of schedules of reasonable and maximum rates, which, being done, the supreme court of Illinois said: "There will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed."

Such being the state of the law, the act of March 10, 1900, was passed.

The mischief to be cured in respect of extortion, as defined

by § 816, was the want of certainty, and the remedy provided was the fixing of the rates by the railroad commission.

In so providing, the act, while repeating many of the provisions of § 819, did, indeed, omit reference to an action by way of information and to liability in damages, and it also omitted the provision that indictments should be made only on the recommendation or request of the railroad commission; but it does not therefore follow that it was the legislative intention, without any expression thereof in terms, to repeal so important a provision.

Was the provision repealed by necessary implication? "We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it [the prior law]; for they may be merely affirmative, or cumulative, or auxiliary." Story, J., *Wood v. United States*, 16 Pet. 362, 10 L. Ed. 995.

Repeals by implication are not favored, and are only allowed to the extent that repugnancy exists, and, in order to give an act not clearly intended as a substitute for an earlier one to the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law. And where it is plain that the new law is in aid of the purposes of the old law, the latter will not be held to be abrogated except so far as there is palpable inconsistency.

We do not think that it was intended to repeal the provision of § 819 requiring indictments to be found only on the recommendation or request of the commission, and still less that it was intended to circumscribe in this particular the general duty of the commission to see that the laws relating to railroads should be faithfully executed.

Dealing as we are with the statutes of Kentucky, we are gratified to find these views confirmed by the court of appeals of that commonwealth, in *Illinois C. R. Co. v. Com.*, decided October 25, 1901, its opinion having been furnished us at the close of the argument, and since reported in 23 Ky. L. Rep. 1159, 64 S. W. 975.

In that case the railroad company was indicted under § 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the company should be exonerated as provided by that section. The judgment was reversed, and Hobson, J., speaking for the court, said:

"In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the

offense and providing for its punishment, for by the next section (Ky. Stat. § 821) it is made the duty of the commission 'to see that the laws relating to all railroads, except street, are faithfully executed;' and under this provision it would be the duty of the commission to see to violations of the preceding section. . . . From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases, and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the railroad, and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

"The long and short haul matter is only another form of undue discrimination and preference, which are provided for by § 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see Gen. Stat. 1021), which was in force at the time of the adoption of the Constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the state should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the state should find indictments."

The 4th section of the act of the general assembly of Kentucky of April 6, 1882 (Acts 1881, p. 66, chap. 790), entitled "An Act to Prevent Extortion and Discrimination in the Transportation of Freight and Passengers by Railroad Corporations, and in Aid of That Purpose to Establish a Board of Railroad Commissioners, and Define its Powers and Duties," set forth in the edition of the Kentucky Statutes of 1887, p. 1021, and referred to by the court, provided for the infliction of penalties on railroad companies convicted of extortion or unlawful discrimination, and that the offender should be "prosecuted by indictment or by action in the name of the commonwealth, upon information filed by the board of railroad commissioners;" and also that the companies should be liable in damages to the parties aggrieved. The act of March 10, 1900, does not appear to have been intended to change the settled legislative policy that indictments should be found on the recommendation of the commission.

The result of these considerations is that the duty of enforcing its rates rests on the commission, and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition, before the rates are fixed at all.

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Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance which were pressed in argument as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court, with a direction to sustain the demurrers and dismiss the bills.

STATE v. DRY FORK R. CO.

(*Supreme Court of Appeals of West Virginia, Nov. 23, 1901.*)

[40 S. E. Rep. 447.]

Indictment—Necessity of Alleging Corporate Existence.*

An indictment against a corporation need not aver that it is a corporation. If such were the requirement, however, the name, "The Dry Fork Railroad Company," would sufficiently import that it is a corporation.

Same—Obstruction of Public Road—Sufficiency of Evidence to Show Existence of Public Road.

To sustain an indictment for obstructing a public road, it must be shown that the road is a public one, not merely a private road. Mere user alone, without its establishment or recognition by order of the county court, or work done upon by the surveyor of roads, will not make it a public road.

Same—Same—Limitations.

An indictment for obstruction of a public road will not be barred by limitation, though such obstruction began more than a year before the indictment, provided it was continued within such year, as every day's continuance of it is a new offense.

Same—Same—Alleging Absence of License to Cross.

It is not necessary, in an indictment against a railroad company for obstructing a public road, to aver that it had no license to occupy or cross the road.

Same—Necessity of Alleging Absence of Statutory Exception.

Where an exception or proviso exempting one from criminal liability is not a part of the description of the offense under a statute, though it be even in the enacting clause, it is not necessary to negative the exception or proviso in the indictment; otherwise, it is necessary.

(Syllabus by the Court.)

Error to circuit court, Randolph county; John Homer Holt, Judge.

The Dry Fork Railroad Company was convicted of obstructing a public road, and brings error. Reversed.

C. Wood Dailey, for plaintiff in error.

Edgar P. Rucker, Atty. Gen., and L. C. Anderson, for the State.

BRANNON, P. The Dry Fork Railroad Company, having been convicted in the circuit court of Randolph county by the verdict of a jury of obstructing a public highway by main-

*As to the necessity of alleging corporate existence where name imports corporation, see 5 Enc. Pl. & Pr. 71 et seq.

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taining a bad crossing where the railroad crossed the public highway, has brought this writ of error.

The indictment is not bad for omitting to aver that the defendant is a corporation. It is very well settled in the Virginias, and generally elsewhere, that in civil cases it is not necessary to aver in a declaration that a party is a corporation, or to show how it became such by pleading its charter. *Rees v. Bank*, 5 Rand. 326, 16 Am. Dec. 755; *Douglass v. Railroad Co.*, 44 W. Va. 267, 28 S. E. 705. I see no reason for drawing any distinction in this matter between civil and criminal proceedings. Individuals and corporations are both persons, both entities,—the one natural, the other legal. But authorities say that it is not necessary in an indictment to say that the defendant is a corporation. 10 Enc. Pl. & Prac. 509. If, however, it were necessary to aver it in the indictment, the name, "The Dry Fork Railroad Company," would import a corporation and be a sufficient averment that it is such. *Gillett v. Ware Co.*, 29 Grat. 565.

The indictment is not bad because of the fact that it does not negative that the defendant might have been authorized by the county court to construct its railroad track over or along the public road. It is true that subdivision 6, § 50, c. 54, Code, gives the authority to a railroad company to construct its road across, along, or upon a highway with the consent of the county court, upon certain conditions. This is a grant of authority, a license to the company; and, when it is charged with public nuisance by the obstruction of a highway, it must prove, as a matter of defense, such license or authority. The indictment charges that the company did unlawfully obstruct the highway. That is enough to call upon the defendant to show its authority, if any it has. The Chesapeake & Ohio Railroad Company was indicted for obstructing a highway, and this court held that it was sufficient to aver that the act was done "unlawfully, or without lawful authority"; that is, in either way. If the act was done unlawfully, it must have been done without authority of the county court. *State v. Chesapeake & O. R. Co.*, 24 W. Va. 809. That case goes far to answer, I think completely answers, this objection. We settled in the cases of *State v. Monongahela R. R. Co.*, 37 W. Va. 108, 16 S. E. 519 and *City of Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161, that even where a railroad company has such authority, if it do not comply with it by keeping a crossing in order, it commits an indictable public nuisance. Besides, this offense is a common-law offense, or, rather, now one under section 45, c. 43, Code, not under subdivision 6, section 50, c. 54. The rule as given in *Hill's Case*, 5 Grat. 682, and *Hendricks' Case*, 75 Va. 943, and *State v. Richards*, 32 W. Va. 356, 9 S. E. 245, 3 L. R. A. 705, is that, where an exception or proviso is not in the enacting clause creating the offense, the indictment need not negative such exception or proviso but the defense must show

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its application. Here the matter is not even in the same statute. The better rule, however, is that, no matter whether the exception or proviso is in the enacting clause or not, if it is not a part of the description of the offense in the statute, it need not be negatived in the indictment; otherwise, it must be. 10 Enc. Pl. & Prac. 495.

No evidence whatever was adduced to show that the road obstructed was a public road. The only evidence bearing on that point is that a few people passed over it with vehicles. Even a general public user is not shown. There is not a bit of evidence to show that the county court ever established this road, or recognized it as a road, or that a surveyor of the county ever assumed any authority over or did any work upon it. As Judge Woods said in *State v. Chesapeake & O. R. Co.*, 24 W. Va. 811, it was incumbent on the state to establish by competent evidence that the road was a public road. This could not be done, except by an order of the county court establishing or recognizing it, or by work on it done by the public under the authority of a surveyor of roads. Mere user will not, without public authority, fasten a road upon the public, with all attendant liability therefor, or deprive the owner of his land. *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673. In *Yates v. Town of West Grafton*, 33 W. Va. 507, 11 S. E. 8, a recognition by the public authorities is required by the fourth point of the syllabus and the opinion by Judge Lucas. *Kelly's Case*, 8 Grat. 632, will sustain this position; also, *Dicken v. Coal Co.*, 41 W. Va. 511, 23 S. E. 582. No evidence is given as to the length of user, even if that could make the road a highway for all purposes. Such long user might bind the landowner, were he disputing the existence of the public way, but not the public, in the absence of recognition of the way by public authority. See *City of Richmond v. Stokes*, 31 Grat. 713.

The point is made that no evidence shows that the obstruction was by the Dry Fork Railroad Company. This criticism of the trial of the case is not without force. It is not explicitly shown what railroad obstructed the highway. A witness was asked whether he was acquainted with the country where the "Dry Fork Railroad crosses the county road," and answered in the affirmative, and was then asked if "at any time prior to the May term of this court the railroad company caused any obstruction to the road," and answered, "Well, the crossing at that time was in bad shape." Taking the expressions, "Dry Fork Railroad" and "the railroad company" together, we may infer that it was the Dry Fork Railroad Company,—merely infer. I think this point would hardly be sufficient to overthrow the verdict.

I think the verdict could not be set aside on the ground that the obstruction was not proven to have been within a year before the indictment. It is fairly shown that the obstruction continued up to a year before the indictment. It may have

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begun longer back than a year, but that makes no difference, if it continued within such year; for every day's continuance of a public nuisance is a fresh offense. 1 Wood, Nuis. 457; City of Valparaiso v. Moffit (Ind. App.) 39 N. E. 909, 54 Am. St. Rep. 522, 528; 1 Bish. New Cr. Law, § 433 (3).

I cite 2 Whart. Cr. Law, § 1473, as additional authority to show the very evident proposition that, "to sustain an indictment for nuisance in obstructing a road, the road must first be shown to be public, and not private."

For want of evidence required by our state authorities as to this point, we must reverse the judgment, set aside the verdict, and remand the case for a new trial.

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(Court of Appeals of New York, Dec. 31, 1901.)

[62 N. E. Rep. 358.]

Railroads in Street—Change of Grade—Liability to Abutters.*

The New York & Harlem Railroad Company possessed the right, as against an abutting owner who had no title in the avenue, to maintain a railroad over an avenue in the city of New York. Laws 1892, c. 399, required the grade of the railroad to be changed, and the erection of a steel viaduct for the trains: *held*, that where the company without negligence, and without directly invading the private property of abutting owners, complied with the statute, it was not liable for damages sustained by such owner because of such erection, in the absence of any statute providing for compensation.

Cullen, Bartlett, and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Action by Gustav R. Fries against the New York & Harlem Railroad Company and others. From a judgment of the appellate division (68 N. Y. Supp. 670) affirming a judgment for plaintiff, defendants appeal. Reversed.

Ira A. Place, Samuel E. Williamson, and Alexander S. Lyman, for appellants.

Joseph A. Flannery, for respondent.

O'BRIEN, J. The plaintiff is the owner of a three-story frame building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is 140 feet wide, and the defendants own and maintain a railroad therein, and have, under some form and under some arrangement, for over 60 years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to

*As to the right of an abutting owner to compensation for the impairment of his easement in the street from the construction of a railroad, see Guinn v. Ohio R. Co. (W. Va.), 13 Am. & Eng. R. Cas., N. S., 437, and note, 444; 7 Rap. & Mack's Dig. 649 et seq.

the plaintiff the sum of \$5,500, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel, who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property, and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question. I cannot perceive how these questions can be of much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed, various resolutions and acts of the city authorities at various times, and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right, without liability to the plaintiff, to have, maintain, and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one; and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad, prior to February 16, 1897, was operating in the center of said Park avenue in front of the plaintiff's premises in a depressed cut, about 14 feet below the surface of said Park avenue, and 61 feet and 8 inches wide, which said railroad cut was bounded on each side by parapet walls of about 2 feet 6 inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th streets, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street, except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That, subsequent to the passage of chapter 339 of the Laws of 1892, there was commenced within the lines of Park avenue, and in the center thereof, the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park avenue and about fifty-nine feet wide. Said work was done under the supervision of the board for Park avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on

February 16, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16, 1897, have been, a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass, and aside from any other causes, the rental value of said premises was depreciated from said date down to April 2, 1900, the date of trial, in the sum of \$1,500." It will be seen that the trial court held that the present viaduct and the operation of trains thereon are, and since the date mentioned have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built, and the trains operated thereon, under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut, and then regulating, grading, and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant, but by the state, in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the track from the depressed cut to the elevated viaduct was the act of the defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde v. Railroad Co.*, 168 N. Y. 597, 61 N. E. 554), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose, and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public. The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave, and grade the whole street, and to this end commanded the rail-

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road to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and, if the change affect the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible.

The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, is held to be *damnum absque injuria*. *Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195, 53 Am. Dec. 357; *Talbot v. Railroad Co.*, 151 N. Y. 155, 45 N. E. 382; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. 821; *Rauenstein v. Railway Co.*, 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768; *Atwater v. Trustees*, 124 N. Y. 602, 27 N. E. 385; *Benner v. Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649. The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence, even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. *Hill v. City of New York*, 139 N. Y. 495, 34 N. E. 1090; *Bohan v. Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Morton v. City of New York*, 140 N. Y. 212, 35 N. E. 490, 22 L. R. A. 241; *Delaware, L. & W. R. Co. v. City of Buffalo*, 158 N. Y. 266, 53 N. E. 44; *Id.*, 158 N. Y. 478, 53 N. E. 533; *Hill v. Asylum Dist.*, 4 Q. B. Div. 433; s. c. on appeal, 6 App. Cas. 193; *Truman v. Railway Co.*, 25 Ch. Div. 423. The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made; but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now, as this court has recently held. *Dodge v. Cornelius*, 168 N. Y.

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242, 61 N. E. 242. The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity, by setting it out in his complaint, and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein Case*, the other cases first cited, and in *Ottenot v. Railway Co.*, 119 N. Y. 603, 23 N. E. 169. The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. *Lewis v. Railroad Co.*, 162 N. Y. 226, 56 N. E. 540. On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass, and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held. *Conabeer v. Railroad Co.*, 156 N. Y. 474, 51 N. E. 402.

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis v. Railroad Co.*, 162 N. Y. 202, 56 N. E. 540. I do not think that anything was presented, discussed, or decided in that

case that warrants the judgment in the case at bar. In the first place, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be controlled by different principles of law." This case does rest upon different facts, comes here in a very different way, and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued, or discussed at all in that case. (2) In that case both parties appealed from a small judgment, and hence neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen, from the report of the case, that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question, by appeal or otherwise, and that concludes the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the state under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the Lewis Case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and, so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall, and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant, with the use of the lodging rooms, for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action.

It will be seen by the findings of the court that the plaintiff was allowed for the diminution in the rental value from February 16, 1897. The damage to the rental value, if any, therefore, belonged to the tenant, and not to the landlord, as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover. *Kernochan v. Railroad Co.*, 128 N. Y. 559, 29 N. E. 65; *Hine v. Same*, 128 N. Y. 571, 29 N. E. 69; *Kearney v. Railway Co.*, 129 N. Y. 76, 29 N. E. 70; *Witmark v. Railroad Co.*, 149 N. Y. 393, 44 N. E. 78. It must be apparent that, at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert, who testified to the course of values in real estate on Madison and Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892 which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled, and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues, which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible, for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on another avenue where there was such a right, was improper and misleading.

The judgment should be reversed, and a new trial granted, costs to abide the event.

MARTIN, J. (concurring). Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (Laws 1892, c. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendant for which the plaintiff claims it is liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence the broad question presented is whether, in the absence of any statute providing for compensation, the defendant is liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature, and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages, unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences, whatever they may be, unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated. Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which, expressly and specifically, required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express

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provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff, or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing v. Smith*, 8 Cow. 146; *Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195, 53 Am. Dec. 357; *Wynehamer v. People*, 13 N. Y. 378, 401; *Davis v. Mayor, etc.*, 14 N. Y. 506, 522, 67 Am. Dec. 186; *Bellinger v. Railroad Co.*, 23 N. Y. 42; *Seldon v. Canal Co.*, 29 N. Y. 634, 642; *Coster v. Mayor, etc.*, 43 N. Y. 399, 415; *Commissioners v. Armstrong*, 45 N. Y. 234, 245, 6 Am. Rep. 70; *Kellinger v. Railroad Co.*, 50 N. Y. 206; *Losee v. Buchanan*, 51 N. Y. 476, 480, 10 Am. Rep. 623; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Clemence v. City of Auburn*, 66 N. Y. 334, 339; *Moore v. City of Albany*, 98 N. Y. 396, 407; *Uline v. Railroad Co.*, 101 N. Y. 98, 107, 4 N. E. 536, 54 Am. Rep. 661; *Conklin v. Railway Co.*, 102 N. Y. 107, 6 N. E. 663; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Heiser v. Mayor, etc.*, 104 N. Y. 68, 72, 9 N. E. 866; *Bohan v. Gaslight Co.*, 122 N. Y. 18, 26, 25 N. E. 246, 9 L. R. A. 711; *Atwater v. Trustees*, 124 N. Y. 602, 608, 27 N. E. 385; *Reining v. Railroad Co.*, 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133; *Egerer v. Railroad Co.*, 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381; *Benner v. Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; *Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co.*, 135 N. Y. 393, 411, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; *Rauenstein v. Railway Co.*, 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768; *Hill v. City of New York*, 139 N. Y. 495, 501, 34 N. E. 1090; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 122, 36 N. E. 821; *Talbot v. Railroad Co.*, 151 N. Y. 155, 45 N. E. 382; *Sullivan v. Dunham*, 161 N. Y. 290, 298, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; *Huffmire v. City of Brooklyn*, 162 N. Y. 584, 589, 57 N. E. 176, 48 L. R. A. 421; *Uppington v. City of New York*, 165 N. Y. 222, 228, 59 N. E. 91, 53 L. R. A. 550. While in some of the cases cited the question here is not involved or decided, still, even in those cases, the rule suggested has been recognized and admitted to be the existing law of this state. Aside from the case of *Lewis v. Railroad Co.*, 162 N. Y. 202, 56 N. E. 540, the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases. While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature

and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of the viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that, upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the general principle applicable to such a case, and not the special law that has been created by the decisions in the elevated railroad cases. While I agree generally with the views expressed by Judge O'Brien, I still think that the decision about to be made can be said to be in conflict with the Lewis Case, and to such extent as it is the Lewis Case should be regarded as limited.

CULLEN, J. (dissenting). I dissent from the decision about to be made, because I regard it as not only inconsistent with our recent decision in the case of Lewis against this defendant (162 N. Y. 202, 56 N. E. 540), but as opposed to the prevailing law of this state. Four propositions are settled law with us: (1) That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property, within the meaning of the constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. *Radcliff's Ex'rs v. Mayor, etc.*, 4 N. Y. 195, 53 Am. Dec. 357; *Talbot v. Railroad Co.*, 151 N. Y. 155, 45 N. E. 382. (2) That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. *Kellinger v. Railroad Co.*, 50 N. Y. 206; *Fobes v. Railroad Co.*, 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453. (3) That an abutter has an easement in the street for the purposes of light, air, and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appropriation of the abutter's property rights, for which, under the constitution, he must be compensated. *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146. See all the elevated railroad cases since that decision. (4) That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in neither case without liability to abutters, it cannot raise the grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. *Reining v. Railroad Co.*, 128 N. Y. 157, 28

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N. E. 640, 14 L. R. A. 133. The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Ex'rs v. Mayor, etc.* That case has been repudiated in many jurisdictions, and, though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he is entitled to compensation. To relieve the defendant from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate, or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court, that an abutter has an easement

of light, air, and access in a street, as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the Lewis Case, but were assumed as settled by the previous decisions of this court, and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the Lewis Case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the Lewis Case and that of Conabeer against this defendant. 156 N. Y. 474, 51 N. E. 402. The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In the Conabeer Case the trial court found, as a matter of fact, that no injury to the plaintiff's easement was occasioned by the new structure. In the Lewis Case, and in the present one, the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law, and, properly construed, it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the maintenance of the obstruction would be properly characterized as lawful; that is to say, as having the authority of law, and as not being a nuisance. It is further contended that, for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional, and that, as no question of its constitutionality was raised in the trial court, none can be raised here. The statute is not unconstitutional, and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional, because the constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the constitution permitting special acts for bridges over the Hudson river below Waterford), it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties

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which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the Lewis Case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject, I should be content to confine myself to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum, concurs with O'BRIEN, J. PARKER, C. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ. BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

SMITH v. PENNSYLVANIA R. Co.

(*Supreme Court of Pennsylvania, Jan. 6, 1902.*)

[50 Atl. Rep. 829.]

Railroads—Grade Crossings—Bridges—Construction — Design — Injuries—Railroad's Liability.

Where a railroad constructed a bridge across its tracks under an agreement between it and a borough council, which agreement prescribed the kind of bridge to be built, and the details of design and construction, and the bridge as constructed was accepted by the borough council, the railroad was not liable to a person injured on the bridge by reason of an alleged defect in its design.

Appeal from court of common pleas, Westmoreland county.

Action by Amanda B. Smith, in behalf of herself and children, against the Pennsylvania Railroad Company, to recover for the death of her husband. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

For many years the Pennsylvania Railroad Company, defendant, has maintained what is known as this train yard at Derry. In addition to the four main tracks, it consists of a number of tracks and sidings parallel with the main line, with switches connecting the entire system of tracks from one end of the yard to the other, one mile or more in length. In the drilling and shifting of cars and the making up of trains, in addition to the regular through traffic on the main line, one or more of the tracks are constantly occupied, so that the crossing of the tracks could rarely be done without great danger to the public or inconvenience and delay to the said railroad company. The said Pennsylvania Railroad runs east and

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west, practically through the middle of the borough of Derry, and crossing these many tracks, sidings, and switches at right angles and at grade were three public streets of the said borough of Derry, known, respectively, as "Ligonier Street," "Chestnut Street," and "Second Avenue," and connecting the north and south portions of said borough. In 1892, in view of the danger aforesaid, the Pennsylvania Railroad Company proposed to the borough of Derry that it would build and maintain at its own expense an overhead bridge across said train yard at a point between the highways crossing at grade, upon the consideration that the said borough would vacate the grade crossings aforesaid. This agreement was in writing. The company, in pursuance thereof, built the bridge and maintained it. On the south end the bridge approached the tracks at right angles, extended across the train yards, and at the north end 25 feet above the ground, just as it barely cleared the tracks, the course of the bridge was turned at right angles to the west, and by a steep incline parallel with the tracks reached the street below. On the 7th day of August, 1897, Hamilton Smith, accompanied by his daughter in a one-horse buggy, drove onto this bridge from the south end, and just as they were about the middle of the structure a fast train from the east came dashing under the bridge, frightened the horse, and caused him to run rapidly to the north end of the said bridge, where, in attempting to make the turn, the horse, buggy, and the two occupants were hurled over the railing, a distance of 25 feet, to the ground below, killing both the occupants of the buggy and the horse.

On the trial plaintiff proved the construction of the bridge to be negligent, and, further, that the railing around the north or "pocket" end of the bridge was wholly inadequate, the said railing consisting of two iron pipes, supported by posts nailed to the outside end of the floor planks. The trial judge, at the close of plaintiff's testimony, granted a compulsory nonsuit on the ground that the bridge had not been made necessary and built by the Pennsylvania Railroad in the original construction of its road, and that its contract with the borough was ultra vires, so far as this plaintiff was concerned.

Denna C. Ogden and Edward B. McCormick, for appellant.
Paul H. Gaither and Cyrus E. Woods, for appellee.

FELL, J. This action was based on the allegation that the defendant company had constructed a bridge over its tracks in a negligent manner. The proof of negligence related to the design of the bridge only, and with this it did not appear that the defendant had anything to do. The nonsuit was entered on the ground that the defendant had incurred no liability to the public by building the bridge. The bridge was constructed under these circumstances: In 1892 three streets crossed the tracks of the railroad company in the borough of Derry. The borough council desired an

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overhead crossing to take the place of the three grade crossings, and agreed with the railroad company to vacate the streets at the crossings if the company would construct and maintain a bridge over its tracks at a point between two of the streets. In pursuance of this agreement the streets were vacated by action of the council, and the bridge was built by the company. The agreement provided for the kind of a bridge to be built, and for the details of design and construction, and that the streets should remain vacated and closed only as long as the bridge should be kept in good order and repair. If the bridge had been built by the railroad company under its power to change the location of a public highway because of a necessity arising in the construction of its road, it would be responsible for defects in design and construction. The duty to supply a road in place of one taken or vacated is imposed on it by the act of 1848, and for neglect in the performance of this duty it is directly responsible to a party injured. *Pennsylvania R. Co. v. Borough of Irwin*, 85 Pa. 336; *Gates v. Railroad Co.*, 150 Pa. 50, 24 Atl. 638, 16 L. R. A. 554. But the bridge was not built under the power conferred by the act of assembly, and in building it the company assumed no duty imposed by the statute. The railroad had been in operation 50 years, and no change was being made in the location or use of its tracks at this point. All that was done was by the direct authority of the borough in the control and management of its streets, and their vacation was conditioned on the proper maintenance of the bridge. The agreement states: "It is the desire of the council of said borough to have an overhead bridge constructed across the tracks of the said railroad company in the said borough, which shall take the place of and be a full substitute for all the grade crossings on said several streets;" and "the said Pennsylvania Railroad Company, favoring the desire of the borough council, is willing to erect an overhead bridge as herein described, and maintain the same." The company did not take any part of the streets, nor assume to exercise any control over them. Indeed, it is very doubtful whether, under any circumstances, it had the power to do what was done in regard to them. Doubtless, it was interested to avoid grade crossings, and as an inducement to the borough to vacate the streets it offered to erect and maintain the bridge. In so doing it incurred no obligation except its contract obligation to the borough. This obligation was fully discharged as to the construction by the acceptance of the bridge by the borough council.

The judgment is affirmed.

CHICAGO & S. E. RY. CO. v. KENNEY et al.*(Supreme Court of Indiana, Nov. 26, 1901.)*

[62 N. E. Rep. 26.]

Receivers—Appointment—Jurisdiction.*

Under Act Feb. 7, 1899 (Acts 1899, p. 13), providing that any action against any domestic corporation may be brought in any county where it has an office or agency for the transaction of business, the court of a county in which a domestic railroad company has an office has jurisdiction of an action for the appointment of a receiver, though the company's principal office is in another county.

Same—Same—Waiver of Objection.

Where, on the application for a receiver of a railroad company, the company entered a special appearance and objected to the jurisdiction on account of the insufficiency of the complaint, and, on the overruling of the objection, moved for a continuance, the motion must be treated as a demurrer, as well as a motion affecting the jurisdiction of the court, operating as a full appearance, waiving all objections to the jurisdiction.

Same—Same—Same—Joinder—Pleading.

In an action for the appointment of a receiver for a railroad company, it is no ground of objection to the jurisdiction over the subject-matter that no joint cause of action in the several plaintiffs was stated.

Same—Same—Same—Improperly Joining Claims.

In an action by several creditors for the appointment of a receiver of a railroad company, the fact that some of the claims set out in the complaint were improperly joined with others over which the court had jurisdiction will not defeat the jurisdiction of the court.

Same—Same—Same—Joinder.

Under the Code, providing that all persons having an interest in the subject of an action, and in obtaining the relief demanded, shall be joined as plaintiff's, the creditors of a railroad company may jointly prosecute an action for the appointment of a receiver, though, in other respects than having a common interest in the relief sought, their interests are distinct.

Same—Same—Appeal from Interlocutory Order.

On appeal from an interlocutory order appointing a receiver, the insufficiency of the facts stated in the complaint, including the improper joinder of parties plaintiff, will be disregarded, except so far as it relates to the appointment prayed for.

Same—Same—Sufficiency of Complaint.

The complaint in an action for the appointment of a receiver is not insufficient because it does not show that plaintiffs have exhausted their legal remedies; it appearing that such remedies are inadequate or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property fund, or to secure justice to the parties.

Same—Same—Same.

The complaint is not defective in merely averring that the defendant is insolvent, without setting out specifically the facts from which the insolvency could be inferred.

Same—Same—Creditors.

To entitle a creditor to ask for the appointment of a receiver, it is not necessary that his claim should be first reduced to judgment.

Same—Same—Averment of Insolvency.

The statement, in an affidavit supporting the complaint in an

*As to jurisdiction of actions against railroads, see generally, 6 Rap. & Mack's Dig. 107 et seq.

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action for the appointment of receiver, that the defendant is insolvent, states an issuable fact, and not a conclusion.

Same—Same—Sufficiency of Evidence of Necessity.

In an action for the appointment of a receiver of a railroad company, the evidence included not only affidavits of complainants that the company was insolvent, but it showed that the judgments and claims of complainants had long been due and unpaid, and that defendant, while admitting their validity, refused to pay them. It further showed that the company's property was mortgaged to its full value, that the company had no rolling stock, that its rails were owned by other persons, that it owed large sums in addition to its mortgage debts, and that for more than three years it had been unable to pay its employees. Some of the evidence was contradicted by affidavits in behalf of defendant: *held*, that the evidence was sufficient to sustain the discretionary action of the court in appointing a receiver.

Same—Same—Postponement—Tender of Bonds.

On an application by creditors of a railroad company for the appointment of a receiver, it was not error to refuse to postpone the hearing of the application to enable defendant to obtain evidence against certain claims, on the tender of a bond to secure their payment, which bond was not large enough to cover all claims set out in the complaint.

Appeal—Waiver of Assignment of Error.

An error assigned on appeal is waived by failure to discuss it.

Appeal from circuit court, Clay county; P. O. Colliver, Judge.

Action for the appointment of a receiver by Charles Kenney and others against the Chicago & Southeastern Railway Company. From an interlocutory order appointing a receiver, defendant appeals. Affirmed.

W. R. Crawford and W. C. Stover, for appellant.

A. H. Ratcliffe, Coffey & McGregor, and Knight & Knight, for appellees.

DOWLING, J. In this action, Charles Kenney and 13 others, holding claims against the Chicago & Southeastern Railway Company, asked the appointment of a receiver for that corporation, the sale of its property, and the equitable distribution of the proceeds of such sale among the creditors. This appeal is from an interlocutory order appointing a receiver. The appellant is a railway corporation organized under the laws of this state, and is operating a railroad between the cities of Anderson and Brazil. For the transaction of its business it maintains two officers in Clay county, Ind., located, respectively, at Cambon and Brazil. Four of the appellees hold judgments against the appellant which were rendered by the Putman circuit court, in this state: three of them have claims for injuries to stock; five assert claims for damages due them for rights of way appropriated by the appellant in the counties of Montgomery and Parke; two hold judgments recovered before a justice of the peace of Parke county; and one sets up a claim upon an account against the appellant. All of these claims are alleged to be due and unpaid. The appellant refuses to pay them, and it is, as the

appellees are informed, insolvent, or in imminent danger of insolvency. These facts are set out in the complaint, which asks that the amount due to each appellee be ascertained by the court, and that a receiver of the property and effects of the appellant be appointed. The complaint was verified. Notice having been served on the appellant on February 11, 1901, that on February 16, 1901, an application for the appointment of a receiver would be made by the appellees to the judge of the Clay circuit court, at chambers, in vacation, the appellant entered a special appearance at the hearing, and objected to the jurisdiction of the court on account of the alleged insufficiency of the complaint. The objections were overruled. A motion was then filed on behalf of the appellant for a postponement of the hearing for one week to enable it to obtain record and other evidence of the invalidity of certain of the claims set out in the complaint. The motion, which was under oath, was accompanied by an offer to pay into court the sum of \$1,500 in discharge of such of the claims as were admitted to be just, or to execute a bond in that amount to secure their payment. The motion was denied. The application for the appointment of a receiver was submitted upon affidavits filed by the parties, respectively. At the close of the evidence the appellant renewed its motion for a postponement of the hearing, and tendered a bond in a penalty of \$1,800 to secure the payment of such claims as should be found to be valid. This motion, also, was overruled. The finding of the court was in favor of the appellees, and an order was made appointing one Simonson receiver. Simonson thereupon qualified by taking the oath and giving bond as required by the statute. To all rulings against it, exceptions were reserved by the appellant. Some 14 errors are assigned, 7 of which question the jurisdiction of the court and judge over the subject of the action and the person of the appellant; 4 deny the validity of the appointment of the receiver; 2 relate to the refusal of the judge to postpone the hearing; and 1 alleges the insufficiency of the facts stated in the complaint to constitute a cause of action.

If the court had jurisdiction of the person of the appellant, the judge of the court, at chambers, in vacation, likewise possessed it. Burns' Rev. St. 1901, § 1236; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682; First Nat. Bank v. United States Encaustic Tile Co., 105 Ind. 227, 236, 4 N. E. 846. The objection to the jurisdiction of the court over the person of the appellant is placed upon the ground that, by an uncontradicted affidavit submitted by the appellant, it appeared that the principal office and usual place of residence of the appellant were in Delaware county, and hence that it could not be sued in Clay county. Whatever uncertainty may have existed under the former statutes as to service of process in such cases, the question has been put at rest by the act of February 7, 1899 (Acts 1899, p. 13), which provides "that any

action against any corporation, organized under any law of this state, may be brought in any county where such corporation has an office or agency for the transaction of business, or in which any person resides upon whom process may be served against such corporation." But, aside from the effect of the statute, it is to be remarked that, upon its so-called special appearance to the application for the appointment of a receiver, the appellant did much more than object to the jurisdiction of the court over its person. It expressly challenged the sufficiency of the facts stated in the complaint to constitute a cause of action. The motion, therefore, must be treated as a demurrer, as well as a motion affecting the jurisdiction of the court. Such a demurrer operates as a full appearance to the action, and as a waiver of all objections to the jurisdiction of the court over the person of the defendant. *Slauter v. Hollowell*, 90 Ind. 286; *Bauer v. Samson Lodge*, 102 Ind. 262, 266, 1 N. E. 571. There was therefore a voluntary appearance by the appellant to the action, and a waiver of all objections to the jurisdiction of the court over its person, if such objections existed.

The jurisdiction of the court over the subject of the action is contested upon the ground that, while some 14 plaintiffs joined in the complaint, no joint cause of action was stated. There is nothing in the objection as thus presented. The subject of the action was the enforcement of a money demand against the appellant, and the seizure and distribution of the property of the appellant through the agency of a receivership. Of such a subject the jurisdiction of the court is unquestionable. The objection goes rather to the sufficiency of the fact stated to show that the plaintiffs below had a common interest in the subject of the action, or in the relief demanded, than to the jurisdiction of the court over the subject of the action. All of the claims mentioned in the complaint were within the jurisdiction of the circuit court, no right of action being asserted under any statute which required the action to be brought in any particular jurisdiction. But, even if some of the claims set out in the complaint were improperly joined with others over which the court had jurisdiction, such misjoinder would not defeat the jurisdiction of the court. As to them the action might be dismissed in the trial court. *Hursh v. Hursh*, 99 Ind. 500; *Naylor v. Sidener*, 106 Ind. 179, 184, 6 N. E. 345; *Ord of Iron Hall v. Banker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; *Gray v. Oughton*, 146 Ind. 285, 286, 45 N. E. 191. The Code provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in the act. It has been held that a common interest in the relief sought authorizes the joinder of several plaintiffs, although in other respects their interests are separate and distinct. *Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St.

Rep. 185; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Robbins v. Turnpike Co., 34 Ind. 461; Small v. Hammes, 156 Ind. 556, 60 N. E. 342. And judgment creditors, although their claims are several, may unite in a suit to set aside a fraudulent conveyance and subject the property to the payment of the judgments. Ruffing v. Tilton, 12 Ind. 259; Field v. Holzman, 93 Ind. 205; Doherty v. Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907. In view of the rule that, where there is unity in interest as to the object to be obtained by the bill, the parties seeking redress in chancery may join in the same complaint and maintain their action together, we think the plaintiffs had the right to prosecute this action jointly. Powell v. Spaulding, 3 G. Greene, 443. Besides, upon an appeal from an interlocutory order appointing a receiver the insufficiency of the facts stated in the complaint, including the improper joinder of parties plaintiff, will be disregarded, except so far as it relates to the appointment prayed for. Woolen, Sp. Proc. § 2280, and cases cited.

In the next place, it is objected that the complaint does not make a case for the appointment of a receiver, for the reason (1) that it does not show that the appellees have exhausted their legal remedies; (2) that the mere averment of insolvency does not authorize the appointment of a receiver; and (3) that a creditor who has not reduced his claim to judgment has no right to ask for such appointment. It is not necessary that a party applying for a receiver should exhaust his remedies at law. It is sufficient if it appears that such remedies are inadequate or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property fund or to secure justice to the parties. Nor do we think that the complaint is defective because it does not set out specifically the facts from which the insolvency of the corporation could be inferred. The charge that the appellant is insolvent tenders an issue of fact, and is in the exact words of the statute. Upon such an issue each party would be at liberty to prove the nature and value of the property of the corporation, and the extent and character of its indebtedness, its inability to pay its obligations as they matured and were presented, or its readiness to meet its just financial engagements. No general rule requires that a creditor shall first reduce his claim to judgment before asking for the appointment of a receiver, and the statute of this state concerning the appointment of receivers cannot be so understood.

The appellant insists that the facts proved upon the hearing of the application for the appointment of the receiver were not sufficient to authorize such appointment. The affidavits submitted by the appellees showed the existence of a considerable part of the indebtedness described in the complaint, and that much of it had long been due. They stated, also, that the property of the appellant was incumbered by mortgages to its full value; that it owns no rolling stock; that it

does not own even the rails constituting its tracks; that it is indebted many thousands of dollars outside of its mortgage debt; that it is now, and for more than three years has been, unable to pay its employees; and that it is wholly insolvent. The appellant contends that the statement in the affidavit presented by the appellees that the appellant is insolvent is the averment, not of a fact, but of a conclusion. Insolvency is provable, undoubtedly, by evidentiary facts showing its existence; but it is provable also by the direct averments of those who know the financial condition of the person or corporation. In *First Nat. Bank v. United States Encaustic Tile Co.*, 105 Ind. 227, 236, 4 N. E. 846, the court say that both the allegations of the facts from which insolvency was inferable and the direct averment of insolvency were statements of "issuable facts," which the corporation could admit or deny. See, also, *Main v. Ginthert*, 92 Ind. 180, 186. Insolvency is the state of a person who is unable to pay his debts as they fall due in the usual course of trade or business. 11 Enc. Pl. & Prac. 3. "An excess of assets over liabilities does not of itself render the debtor solvent. The assets may not be readily convertible into money, and, notwithstanding their supposed value, the debtor may not be able to pay the claims against him as they become due. By the word 'insolvency' is meant a general inability to pay one's debts, and of this inability the failure to pay one's just and admitted debt would probably be sufficient evidence." *Benj. Sales*, § 837; *Smith, Merc. Law*, 550. The evidence included not only the declaration of the affiants that the appellant was insolvent, or in imminent danger of insolvency, but it showed, also, that the judgments and other claims of some of the appellees had long been due and unpaid, and that the appellant, while admitting their justice and validity, persistently refused to pay them. The proof did not stop here. It disclosed that the property of the appellant was incumbered by mortgages to its full value, that the appellant owns no rolling stock, that its rails are owned by other persons, that it owes large sums in addition to its mortgage debts, and that for more than three years past it has been unable to pay its employees. It is true that some of these statements are controverted by affidavits submitted on behalf of the appellant, but the judge before whom the application was made had to decide between these conflicting statements. He did so, and we cannot say that his decision was erroneous, or that there was an abuse of judicial discretion in such decision. The proof on the part of the appellees demonstrated the futility of an attempt to collect the claims of the appellees by the ordinary process of execution. *Cabinetmakers' Union v. City of Indianapolis*, 145 Ind. 671, 44 N. E. 757; *Mead v. Burk*, 156 Ind. 577, 580, 581, 60 N. E. 338, and cases cited on page 582, 156 Ind., and page 340, 60 N. E. As was said by the court in *Mead v. Burk*, *supra*: "The rule that this court will not weigh evidence on

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appeal finds no exception in suits in equity, nor in actions or proceedings where the evidence upon the trial or the hearing of the matter in issue is presented to the lower court by means of depositions, affidavits, or other documentary evidence. *Cabinetmakers' Union v. City of Indianapolis*, 145 Ind. 671, 44 N. E. 757. In order to justify this court in disturbing the judgment of the lower court in any case or proceeding upon the evidence alone, the latter must be such as to raise a question of law, and not one merely of fact. *Lee v. State*, 156 Ind. 541, 60 N. E. 340, and cases there cited. Under this rule, the order appointing a receiver will not be disturbed on appeal upon the evidence alone, unless the appellant or complaining party clearly shows by it that thereby a matter of law in respect to the abuse of discretion on the part of the trial court is presented. As in other cases, where there is evidence to sustain the order upon every essential point, it will not be reversed on appeal. *Pouder v. Tate*, 96 Ind. 330; *Naylor v. Sidener*, 106 Ind. 179, 6 N. E. 345."

The ninth and eleventh assignments of error question the propriety of the refusal of the judge to postpone the hearing of the application upon the tender of a bond by the appellant to secure the payment of such of the claims as should be found just and owing. The object of the proposed delay was to afford the appellant an opportunity to investigate some of the claims set out in the complaint, and to produce evidence against them. This was not a matter connected directly with the appointment of the receiver, and the decision of the court as to these claims was interlocutory only, and not final. Their validity was subject to full investigation and proof upon the final trial. The payment or bond tendered was not sufficient to cover all the claims set out in the complaint. The judge could not discriminate between them, nor was he compelled to decide upon their merits at that stage of the proceedings.

The fourteenth and last error assigned is waived by the failure of counsel for appellant to discuss it.

Finding no error, the judgment is affirmed.

STATE OF ARKANSAS, Appt., v. KANSAS & TEXAS COAL COMPANY and St. Louis & San Francisco Railroad Company.

(Submitted October 23, 1901. Decided December 2, 1901.)

[22 Sup. Ct. Rep. 47.]

Suit between State and Foreign Corporation—Diverse Citizenship.

A suit in a state court between a state and foreign corporations is not removable to the United States circuit court as a controversy between citizens of different states, as a state is not a citizen.

Judicial Notice—Railroad Passenger Routes.

A United States circuit court cannot, on a petition for removal from a state court of a suit to enjoin the importation of armed men into Sebastian county, Arkansas, and the town of Huntington therein,

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where a strike exists, take judicial notice, for the purpose of maintaining jurisdiction, that such persons could only be brought to Huntington by way of the Indian territory, and that the word "import," as used in the bill, means to bring into from another state or foreign country, as the court cannot make the complainant's case other than it made it by taking judicial notice of facts which it did not choose to rely on in its pleading.

Suits Arising under Constitution and Laws of United States.

A suit brought in the state court to enjoin the threatened importation of armed men into a county where a strike existed, on the ground that this would amount to a public nuisance and would endanger the health, morals, peace, and good order of the community, is not removable to a United States circuit court, under the act of March 3, 1887, as corrected by the act of August 13, 1888, as one arising under the Constitution and laws of the United States, since, even assuming that the bill shows upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the 14th Amendment, it only demonstrates that the bill cannot be maintained, and not that the cause of action arose under the Constitution or laws of the United States.

Appeal from an order of the Circuit Court of the United States for the Western District of Arkansas overruling a motion to remand the cause to the state court. Reversed and remanded, with a direction to remand to the state court.

See same case below, 96 Fed. 353.

Statement by MR. CHIEF JUSTICE FULLER:

This was a bill filed in the circuit court of Sebastian county, for the district of Greenwood, Arkansas, by "The state of Arkansas, on the relation of Jo Johnson, prosecuting attorney for the twelfth judicial circuit," against the Kansas & Texas Coal Company and the St. Louis & San Francisco Railroad Company, which "for her cause of action" alleged that the railroad company was "a corporation organized under the laws of the state of Missouri, owning and operating a railroad in the twelfth judicial circuit of Arkansas and more particularly in Sebastian county, of said circuit;" that the coal company was "a corporation duly organized under the laws of the state of Missouri, owning and operating a coal mine in Huntington, in the Greenwood district of Sebastian county." "That a high state of excitement and condition of hot blood now prevails between striking miners and their sympathizers in large numbers, on the one side, and said coal company and its employees, on the other. That said coal company is threatening and is about to import into said county and town of Huntington, over the line of their codefendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about 200, to the great danger of the public peace, morals, and good health of said county, and more particularly of said town. That said threatened action on the part of said defendant, if permitted to be executed, would become a great public nuisance, and would destroy the peace, morals, and good health of said county and town, and would lead to riot, bloodshed, and to the dissemination of contagious and infectious diseases."

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The bill prayed "that the defendant Kansas & Texas Coal Company, its agents, servants, and employees, and each of them, be restrained and prohibited from importing or causing to be imported or brought into Sebastian county or the twelfth judicial circuit of Arkansas, and that the St. Louis & San Francisco Railroad Company, its agents, servants, and employees,—each, both, and all of them,—be enjoined, restrained, and prohibited from importing, hauling, or bringing, or causing to be imported, hauled, or brought, in the said county or circuit, and from unloading or attempting to unload from any of its cars in said county or circuit, any and all large bodies of armed, lawless, or riotous persons or persons affected with contagious or infectious diseases that might endanger the peace, good order, or good health of the state, or create a public nuisance in said county or circuit, under the pains and penalty of the law."

A preliminary injunction was granted and process issued. Defendants filed their petition and bond for removal, and made application therefor, which was denied by the circuit court of Sebastian county, whereupon defendants filed in the United States circuit court for the western district of Arkansas a certified transcript of the record and of the pleadings and papers in the case.

The petition for removal averred that Jo Johnson was a citizen of Arkansas, that defendants were citizens of Missouri, and that the controversy in suit was wholly between citizens of different states; and also that, treating the state of Arkansas as complainant, the suit was one arising under the Constitution and laws of the United States because defendants were engaged in interstate commerce, and the action was an unlawful interference therewith by reason of the commerce clause of the Federal Constitution and of laws passed in pursuance thereof; and which constituted a defense in the premises.

Complainant moved to remand the cause, and defendants moved to dissolve the injunction and that complainant be restrained from the prosecution of the suit in the state court. The circuit court of the United States overruled the motion to remand, and sustained the motion to dissolve, but declined to enjoin complainant. 96 Fed. 353. The cause came on subsequently for final hearing, the bill was dismissed, and this appeal was prosecuted.

Mr. Ben T. DuVal submitted the cause for appellant.

Messrs. Joseph M. Hill, James Brizzolara, and Adiel Sherwood submitted the cause for appellees.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

The gravamen of the bill was the injury to the health, morals, peace, and good order of the people of the town and county, the infliction of which was alleged to be threatened by the bringing within their precincts of certain persons by

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defendants. No statute of the state was referred to as applicable, but the enforcement of the police power was sought through the interposition of a court of equity by way of prevention of an impending public nuisance. The circuit court was of opinion that the bill could not be maintained; but, without intimating any conclusion to the contrary, or criticising its formal sufficiency, the question that meets us on the threshold is whether the case ought to have been remanded to the state court.

We need not spend any time on the contention that this was a controversy between citizens of different states. The circuit court correctly held otherwise. The state of Arkansas was the party complainant, and a state is not a citizen. *Postal Teleg. Cable Co. v. United States*, 155 U. S. 482, sub nom. *Postal Teleg. Cable Co. v. Alabama*, 39 L. Ed. 231, 15 Sup. Ct. Rep. 192.

We inquire, then, if the cause was removable because arising under the Constitution or laws of the United States.

The general policy of the act of March 3, 1887, as corrected by the act of August 13, 1888 (24 Stat. at L. 552, chap. 373; 25 Stat. at L. 433, chap. 866), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the circuit courts. Those cases, and those only, were made removable under § 2, in respect of which original jurisdiction was given to the circuit courts by § 1. Hence it has been settled that a case cannot be removed from a state court into the circuit court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And, moreover, that jurisdiction is not conferred by allegations that the defendant intends to assert a defense based on the Constitution or a law or treaty of the United States, or under the statutes of the United States or of a state, in conflict with the Constitution. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. Ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. Ed. 85, 15 Sup. Ct. Rep. 34; *Walker v. Collins*, 167 U. S. 57, 42 L. Ed. 76, 17 Sup. Ct. Rep. 738; *Sawyer v. Kochersperger*, 170 U. S. 303, 42 L. Ed. 1046, 18 Sup. Ct. Rep. 946; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. Ed. 486, 20 Sup. Ct. Rep. 399.

In this case the state asserted no right under the Constitution or laws of the United States, and put forward no ground of relief derived from either. There were no averments on which the state could have invoked the original jurisdiction of the circuit court under § 1 of the act, and that is the test of the right of removal under § 2.

The police power was appealed to, the power to protect life, liberty, and property, to conserve the public health and good

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order, which always belonged to the states, and was not surrendered to the general government, or directly restrained by the Constitution. The 14th Amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest Congress with power to legislate upon subjects which are within the domain of state legislation. *Re Rahrer*, 140 U. S. 554, sub nom. *Wilkerson v. Rahrer*, 35 L. Ed. 574, 11 Sup. Ct. Rep. 865. It is true that when the police power and the commercial power come into collision, that which is not supreme must give way to that which is supreme. But how is such collision made to appear?

Defendants argue that the circuit court might have properly taken judicial notice, or did so, of the fact that the persons whose advent was objected to as perilous to the community could only be brought to Huntington by way of the Indian territory, and also that the word "import" as used in the bill meant to bring into from another state or foreign country; that, therefore, "the question is fairly presented by the complaint whether the state of Arkansas has the authority to prevent the coal company and the railroad company from bringing into the state, over the line of this railroad, laborers from other states or foreign countries;" and hence that the circuit court had jurisdiction. We do not agree with either premise or conclusion.

The word "import" necessarily meant bringing into the county and town from outside their boundaries, but we do not think, taking the whole bill together, that as here used its necessary signification was the bringing in from outside of the state.

And as to judicial knowledge, the principle applies "that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." *Thayer*, *Ev.* chap. 7, 281.

In *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 45 L. Ed. 656, 21 Sup. Ct. Rep. 488, which was a petition for removal, the suit was one brought in support of an adverse claim under the Revised Statutes, §§ 2325, 2326, and it had been previously decided that such a suit was not one arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal courts regardless of the citizenship of the parties. And we said: "It is conceded by counsel on both sides that those decisions are controlling, unless the circuit court was entitled to maintain jurisdiction by taking judicial notice of the fact 'that the Mountain View lode claim was located upon what had been or was an Indian

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reservation,' and 'of the act of Congress declaring the north half of the reservation upon which the claim was located, to have been restored to the public domain;' notwithstanding no claim based on these facts was stated in the complaint. But the circuit court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge." *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. Ed. 1048, 16 Sup. Ct. Rep. 869; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. Ed. 85, 15 Sup. Ct. Rep. 34; *Com. v. Wheeler*, 162 Mass. 429, 38 N. E. 1115; *Partridge v. Strange*, 1 Plowd. 77.

But even assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the 14th Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States.

When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them. If errors supervene, the remedy by writ of error is open to the party aggrieved. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 Sup. Ct. Rep. 544.

Decree reversed and cause remanded, with a direction to remand to the state court. Costs of this court and of the circuit court to be paid by the appellees and defendants.

LADD v. BROCKTON ST. RY. CO.

(*Supreme Judicial Court of Massachusetts, Essex, Feb. 27, 1902.*)

[62 N. E. Rep. 730.]

Injury to Employee—Assumption of Risk—Obvious Danger.*

Plaintiff, engaged in learning the duties of conductor on defendant's street car, while standing on the running board of a moving car along the track on the side of a road, was struck by a trolley post and injured. He was an experienced man, and familiar with the duties of a conductor. He knew that it was common to have the tracks on one side of a street, and knew that in such cases there would be trolley posts. He was sent out on this part of the road to learn the conditions of its operation, and had made two trips before the accident. He failed to observe whether the car was in the center or on the side of the road, and paid no attention to trolley posts, and when stepping down on the running board to perform certain duties as conductor he did not look to see if there were obstructions. The running board on the opposite side of the car could have been used with safety. Defendant's tracks had been in the same position for several years, and the condition of the track and trolley posts was not unusual: *held*, that the plaintiff assumed the risk, the danger being obvious.

*See generally, 20 Am. & Eng. Enc. Law (2d Ed.) 109 et seq.; 5 Rap. & Mack's Dig. 126 et seq.

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Same—Contributory Negligence of Employee Sent Out to Learn Duties of Conductor of Street Car.

In such a case, where plaintiff had been sent out to learn the conditions attending the operation of a street car, he was guilty of negligence in stepping down to the running board without looking to see whether it was safe so to do.

Exceptions from superior court, Essex county; Edward P. Pierce, Judge.

Action by Harding P. Ladd against the Brockton Street Railway Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Philip A. Kiely, for plaintiff.

H. F. Hurlburt and Damon E. Hall, for defendant.

MORTON, J. This is an action of tort for personal injuries sustained by the plaintiff while engaged in learning the duties of a conductor upon the defendant's road in anticipation of being so employed by it. The declaration is in three counts: The first for negligently placing and maintaining a post in its roadbed so near the rail that the plaintiff, while walking on the running board of a car in the discharge of his duty, came in contact with it, and received the injuries complained of; the second, under St. 1887, c. 270, for a defect in the ways and works which arose from, or had not been discovered in consequence of, the negligence of the defendant, or of some one in its employ intrusted with the duty of seeing that the ways and works were in proper condition, the defect consisting of the post aforesaid; and the third for setting the plaintiff to work in a dangerous place. At the close of the plaintiff's evidence the court directed a verdict for the defendant, and the plaintiff excepted.

We think that the ruling was right. The accident occurred about the middle of the forenoon on August 30, 1899. The day was bright. The plaintiff began learning the duties of a conductor in the defendant's employ two days before the accident. He had not worked in this part of the defendant's road before that morning. But on that morning he had made two or more trips by the place where the accident happened. He had acted as conductor on other roads in this state and in New York, and testified that he was familiar with the duties of conductor, and considered himself an experienced man. At the place of the accident the track ran along the side of the road for about 1000 feet, and then ran in the center of the road. The post which the plaintiff struck was a trolley post, and was one of several along the side of the track at that place, and all about the same distance from the track, and they and the track had been in the same positions for eight or nine years. There was no evidence that the construction was unusual, or that the posts were unusually near to the track. The plaintiff testified that he knew that it was common in country towns to have tracks run on one side of the road, and that he knew that in such cases there were posts for the trolley

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wire. He also testified that he did not observe whether the car was on the side of the road or in the center, and paid no attention to that fact, or to the post or poles or tracks. And there was nothing to show that as he stepped down onto the running board he looked to see if there were any obstructions, or exercised any precautions. It also appeared that the running board on the opposite side of the car would have been entirely safe, and that there was nothing requiring him to use the running board on one side of the car rather than the other. We think it plain that the risk was an obvious one, which the plaintiff must be held to have assumed, and that he was not in the exercise of due care. The situation of the posts and track was manifest, or, so far as appears, was not unusual. There was nothing in the nature of a trap. The plaintiff was familiar with the duties of a conductor. The defendant owed him no duty of warning or instruction in regard to dangers that were obvious, and it owed him no duty to change the arrangement of the track and the posts. Upon entering the employment of the defendant, the plaintiff must be held to have contracted with reference to those as they were. *Lemoine v. Aldrich*, 177 Mass. 89, 58 N. E. 178. Moreover, in view of the fact that the plaintiff had been sent out upon that portion of the defendant's road where he was when injured to learn the conditions attending its operation there, it seems to us that to step down onto the running board as he did without looking to see whether there was any obstruction in the way or whether it was safe to do so was negligence on his part.

Exceptions overruled.

TIRRELL v. NEW YORK, N. H. & H. R. R.

(*Supreme Judicial Court of Massachusetts, Norfolk, Feb. 27, 1902.*)

[62 N. E. Rep. 745.]

Master and Servant—Railroads—Death of Servant—Negligence.*

Where a railway company's rules caution its gatemen not to rely on signals, and to perform no work except guarding the crossing, it is not liable for the death of a gateman, who, after closing his gates, and knowing of the presence of a train moving to and fro over the crossing, for some unexplained reason left his gates, and was struck by the train while standing between the tracks.

Exceptions from superior court, Norfolk county; Robert R. Bishop, Judge.

Action by one Tirrell against the New York, New Haven & Hartford Railroad to recover damages for the death of her husband, who was killed in defendant's employ. There was a

*As to the effect of contributory negligence on right of employee to recover for his personal injuries, see *Alabama, G. S. R. Co. v. Roach* (Ala.), 11 Am. & Eng. R. Cas., N. S., 869, and note, 869 et seq.; 20 Am. & Eng. Enc. Law (2d Ed.) 134 et seq.; 5 Rap. & Mack's Dig. 184 et seq.

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judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

S. Henry Hooper and A. F. Flint, for plaintiff.

Chas. F. Choate, Jr., for defendant.

HOLMES, C. J. These actions are brought under St. 1887, c. 270, §§ 1, 2, for the death of the plaintiff's husband and intestate, Joseph R. Tirrell, with a count in the second case under Pub. St. c. 112, § 212; St. 1883, c. 243. Tirrell was employed by the defendant as a gateman at a crossing. The accident happened at this crossing at night. It was usual for a south-bound freight train from Boston to make some changes at this place and time, and it was engaged in making them when Tirrell was killed. In the process the engine necessarily moved and had moved to and fro past the crossing. Tirrell had shut his gates and knew of the presence of the train. He must have known also what it was engaged in doing and what it might be expected to do. The plaintiff's case is that just before the accident the tender of the engine while standing near the crossing had been connected with a car on a parallel track by means of a stake, that it started suddenly in order to move the car, the car but not the engine having been stationary for a few minutes before, and that Tirrell, who for some unexplained reason had left his gates was struck by the stake and killed while standing between the tracks. The judge before whom the case was tried directed a verdict for the defendant, and the plaintiff brings the case here on exceptions.

We are of opinion that the direction was right. The plaintiff cites various rules of the defendant to show that the defendant was negligent in not having a light on the end of the tender nearest to Tirrell, in not ringing before the engine started, etc., and also contends that the use of the stake was improper and dangerous. Without examining the rules in detail to consider whether any of them apply to movements such as those in which the engine was engaged, or otherwise might have affected Tirrell's rights, it is enough for us to say that the plaintiff, if she invokes the rules, must take the burden with the benefit, and that the rules cautioned gatemen not to rely upon whistles or bells, and instructed them to prevent any one from crossing the track while the gates were down, and not to perform any work except guarding the crossing and property of the company. Apart from the rules, Tirrell himself having given the signal of present danger by lowering his gates, and having his place of duty by those gates, went across the tracks at his own peril unless called by some unusual duty such as is not shown to have existed in this case.

We have stated the case in the barest possible way, stripped of all the facts which the plaintiff possibly might dispute. The indications of the evidence are more favorable to the defendant. It is suggested that Tirrell may have been led to

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cross by the arrival of a horse and wagon at the other side of the track. But it does not appear that the wagon arrived until after the accident, or that if there earlier it offered any reason for Tirrell's attempt, or that in fact it influenced his mind in any way. We perceive no grounds upon which the defendant reasonably could have been charged. See *Dyer v. Railroad Co.*, 170 Mass. 148, 48 N. E. 1087; *Caron v. Railroad Co.*, 164 Mass. 523, 531, 42 N. E. 112; *Granger v. Railroad Co.*, 146 Mass. 276, 281, 15 N. E. 619.

Our decision makes it unnecessary to consider the rulings as to evidence.

Exceptions overruled.

O'BRIEN v. NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1902.*)

[62 N. E. Rep. 727.]

Injury to Employee—Directing Verdict.*

In an action against a railroad company for injury to a brakeman alleged to have been caused by a brake wheel slipping around on its staff, evidence considered, and *held* to show that, if the accident was caused as alleged, plaintiff, by exercise of ordinary care, could have discovered by the "chucking" of the wheel that it was loose, and hence a verdict for defendant was properly ordered.

Report from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by one O'Brien against the New York, New Haven & Hartford Railroad Company. Verdict for defendant ordered by the trial court, and case reported to the supreme court. Judgment on the verdict.

S. A. Fuller and Thos. I. Hogan, for plaintiff.

Chas. F. Choate, Jr., for defendant.

LORING, J. We are of opinion that the presiding judge was right in directing a verdict for the defendant. The plaintiff testified that he was injured shortly after midnight on March 30, 1898. At the time he was employed by the defendant as a freight brakeman. While the freight train on which he was employed was delivering and taking up freight cars at a way station, the plaintiff was directed by the conductor of the train to take care of three box cars which had been "kicked" by the engine onto a side track. As the cars went by him, the plaintiff, in pursuance of this order, boarded the head car, climbed to the top of it, and undertook to stop all three cars by setting up the brake on that one. He did this to "save going back over the cars," as it was raining hard, it was dark, and he was not used to the yard at that station. He had been working for the defendant for 10 days only. He stood with both feet on a step 12 to 16 inches below the top

*See generally, preceding case and foot-note.

of the car. This step held the ratchet and dog of the brake. It was put there to stand on in setting up the brake. He had one foot against the dog, and that worked "all right." He put his lantern on the running board of the car. He pulled on the brake wheel six or eight times, turning it around entirely four to six times before he "got the slack of the chain in good shape." He then swung around again, putting his full weight and strength on the wheel. The brake wheel "gave way on the staff," "the wheel slipped on the staff," his hip struck the end of the car on the right side, and he fell, striking on his face between the rails. As soon as he touched the ground the car struck him. The plaintiff had been employed as a brakeman by other railroads for six years and a half. At the time of the accident he weighed 205 pounds, and was 29 years of age. The car was one of the defendant's cars. He testified that he did not look at the brake before using it, and that he did not see the wheel turn on the staff, and that he did not see anything the matter with the brake or the staff. He also testified that, if he knew that a brake wheel slipped around, he looked out for it; that in that case he "didn't go near" it. Besides his own testimony, the plaintiff introduced that of two other brakemen. One testified that in 18 years' experience he had met with wheels which slipped around the staff, "many a time." The other (Whitney by name) testified that where the brake wheel joins the staff each of them is on the square; that, in using, the corners of these squares get worn (that is to say, sometimes the corner of the square of the wheel gets worn, sometimes that of the staff, and sometimes both), and eventually the wheel will slip on the staff; that it takes years to wear off the squares so that a wheel will slip round. He further testified on direct examination that, to find out whether a wheel is worn so that it will slip, "you take the nut from the top, and take the wheel off and look at your staff. That is the only way you can notice. And another way you might notice it, by working your wheel. As you catch hold of the wheel, sometimes it will chuck. That shows that it is worn on the staff or on the wheel." On cross-examination he testified that in his 10 years' experience he had come across as many as a thousand wheels that turned on the staff; and in answer to the question, "You can always tell them all the same way?" he answered "By the chuck of the wheel;" and, "As soon as you take hold of it you can't tell it; until you get the slack of your chain up." The defendant introduced the testimony of the conductor and of one of the crew of the freight train in question; also that of a car inspector, who made an inspection of this car three hours after the accident, and of the foreman of the car shops where this car was overhauled a month and a half later. Besides contradicting the evidence of the plaintiff in some respects which are not now material, the defendant's testimony showed that immediately after the accident it was found by actual

trial that the wheel did not turn on the staff, and that the nut holding the wheel in place was on, and was screwed down tight. In addition, the defendant's evidence showed more in detail what the construction of the brake wheel and staff is. It showed that the top of the staff is square, excepting the very end. On the very end a thread is cut for the nut which holds the wheel on the staff. The square part of the staff tapers up in size, being smaller at the top. The hole of the wheel, which fits on the staff, is also square, and tapers in size as the staff does. It appeared that the nut keeps the wheel hard down on the staff, and that in fact there is no play between the two when the wheel is in use, and that the corners do not get worn in use, and that the wheels do not turn on the staff unless the nut is loose or the washer between the nut and the wheel is worn. The contention of the defendant was that either there was a kink in the chain, or that the chain wound around over itself as the slack was taken up, and slipped off when the plaintiff put on the last turn of the wheel, or that his hands slipped on the wheel, either of which might have happened, particularly as it was raining hard at the time.

The plaintiff in this court has argued his case on the footing that the nut was screwed down tight, and there is nothing to show that the plaintiff made a different contention in the court below. Therefore the case must be disposed of on the footing that the nut was screwed down tight. If the nut was screwed down tight, and yet the squares of the staff or of the wheel, or either, were so worn that the wheel would slip on the staff, it is inconceivable that the wheel would not work somewhat while the slack of the chain was being taken up, and before the weight of the brakeman was thrown onto the wheel. That is to say, the fact that the wheel was loose on the staff must have been known at a time when no harm would have come to the plaintiff, if the wheel had, in the language of his own witness, "chucked." Moreover, direct evidence of that was put in by the plaintiff. On a fair consideration of the whole testimony of the plaintiff's witness Whitney, we think that he must be taken to have testified that "you can always tell when the squares are worn by the chuck of the wheel," and that "you can always tell whether that is so or not by the time you have got the slack of the chain taken up." The result is that, if the plaintiff's statement is true, that the wheel, and not the chain, slipped on the staff, he would have found it out while getting in the slack of the chain, had he been in the exercise of due care, and therefore he cannot recover. The result would not have been changed had the plaintiff wished to go to the jury on the ground that the wheel slipped because the nut was loose. In that case, also, the plaintiff, if he had exercised due care, must have become aware that the wheel was loose while he was taking up the slack of the chain.

Judgment on the verdict.

ROBERTS v. ALBANY & N. RY. CO.*(Supreme Court of Georgia, Feb. 6, 1902.)*

[40 S. E. Rep. 698.]

Injury to Railroad Employee—Contributory Negligence.*

It appeared from the evidence of the plaintiff, who was an employee of the defendant railway company, that he was not free from fault, and that his negligence directly contributed to his injury. The nonsuit granted by the court below was therefore proper.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Action by J. H. Roberts against the Albany & Northern Railway Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

Allen Fort, P. Ellis, and A. Doris, for plaintiff in error.

W. F. Clarke, D. H. Pope & Son, and F. A. Hooper, for defendant in error.

PER CURIAM. Judgment affirmed.

GALVESTON, H. & S. A. RY. CO. v. QUAY.*(Court of Civil Appeals of Texas, Dec. 11, 1901.)*

[66 S. W. Rep. 219.]

Injury to Employee—Negligence in Detaching Tender from Engine.†

While plaintiff, a locomotive fireman, was cleaning an engine which was standing over a pit in defendant's roundhouse, other servants of defendant, by direction of the foreman, detached the tender, and pushed it away from the engine without notice to plaintiff. Plaintiff, in prosecuting his work in the engine cab, stepped back and fell through the open space left by the removal of the tender, into the pit: *held*, that a finding that defendant was negligent in so removing such tender without notice to plaintiff was justified.

Same—Same—Contributory Negligence.

The question whether plaintiff was negligent in failing to notice that the tender had been removed was for the jury.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Albert M. Quay against the Galveston, Houston & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Newton & Ward and Baker, Botts, Baker & Lovett, for appellant.

H. C. Carter and Perry J. Lewis, for appellee.

NEILL, J. This action was brought by appellee against the appellant to recover damages for personal injuries alleged

*See generally, preceding case and foot-note.

†See generally, 20 Am. & Eng. Enc. Law (2d Ed.) 54 et seq.

to have been caused by the negligence of the company. Appellant answered by a general denial and a plea of contributory negligence. The trial resulted in a verdict and judgment in favor of appellee for \$10,000.

Our conclusions of fact will be found in observance of the well-established principle that the most favorable inferences which the entire evidence will authorize should be drawn in support of the verdict. The issues of fact to be solved are (1) whether the appellant was guilty of negligence proximately causing appellee's injuries, and (2) whether appellee was guilty of negligence contributing to them. The facts are these: On the 28th day of September, 1900, appellee, a locomotive fireman, was ordered by appellant to clean one of its engines, standing, with its tender attached, over a pit about four feet deep, in the company's roundhouse in San Antonio. The platforms on the engine's cab and of its tender when connected constitute what is called by railroad men a deck, upon which the engineer and fireman discharge their respective duties, and, running back from the head of the boiler, is about six or eight feet long. In obedience to his orders the appellee, when the engine and tender were connected, went on board of this deck and proceeded to clean the engine as directed. While engaged in this work, two of appellant's servants, whose grade of employment was not the same as appellee's, under the direction of the company's vice principal, without notice to appellee, without his having reason to believe the tender would be separated from the engine while he was at work thereon, and without his knowledge, detached the tender, and, with a pinch bar applied to the wheels farthest from where appellee was engaged, pushed it back three or four feet from the engine, thus separating the part of the deck constituted by the tender from that made of the platform of the engine's cab, leaving appellee with just half of the deck he had when he went to work, and without protection from the pit behind him, the bottom of which was about eight feet from the platform of the cab where he was at work. Having cleaned the head of the engine's boiler, appellee, without knowing or having reason to believe the tender had been moved, but believing the condition of the deck was the same as it was when he commenced the job, stepped back to inspect the work he had done, caught his heel under the apron of the tender, which was displaced when the tank was moved, fell backward across a beam of the pit, and from it to the bottom, whereby he sustained permanent bodily injuries. The appellee's petition alleges that appellant was guilty of negligence in moving the tank while he was at work on the engine, without his knowledge or giving him warning. Appellant's contentions are that the facts do not constitute negligence on its part; that if they do the undisputed evidence shows that appellee was guilty of contributory negligence, and that therefore the trial court erred in sub-

mitting the case to the jury, and not peremptorily instructing a verdict in its favor.

Primarily the question of negligence is one of pure fact, and where the evidence is either conflicting or fairly susceptible of different interpretations, or the inference from the evidence doubtful, the question is for the jury. The master is bound to use ordinary care, diligence, and skill for the purpose of protecting his servants from encountering unnecessary risks in his service. The servant has the right to presume and act upon the presumption that his master has performed and will continue to discharge the duty he owes his employee. Warning of danger should be given whenever the master knows it is reasonably necessary to protect the servant from danger. The servant can presume that while in the discharge of his duty his master will warn him of a danger that has supervened from a change of conditions, brought about by the act of the master, since he commenced his work, and of which he had no knowledge. *Rehman v. Railway Co.* (Minn.) 44 N. W. 522; *Shumway v. Manufacturing Co.*, 98 Mich. 411, 57 N. W. 251; *Michael v. Machine Works* (Va.) 19 S. E. 261, 44 Am. St. Rep. 927; *Davis v. Railway Co.* (Mass.) 34 N. E. 1070; *Railroad Co. v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596. When the appellee went to work the deck was entire, and, had it remained so, after cleaning the boiler head, he would have encountered no danger in stepping backwards. His peril in making this step was brought by the act of servants in another department and grade of employment—with which appellant is chargeable—after appellee began his work on the engine. He was not informed of the separation of the tender from the engine, knew nothing of it, and was not warned of the perilous position it left him in. Appellant could have readily anticipated that appellee, without notice or warning of the danger, might act (as he had the right to do) upon the assumption that conditions had been unchanged, and that the danger did not exist, and that in acting upon such assumption he was liable to be seriously injured. The jury, upon a proper charge, found from the evidence that appellant was guilty of negligence as alleged, and we believe the evidence on this issue is sufficient to support their verdict.

Does the evidence show that appellee was guilty of contributory negligence? As a general rule, the master cannot escape liability on the ground of the servant's contributory negligence unless the elements of danger are shown to have been known, either actually or constructively, to the servant. Negligence can only be affirmed in respect to situations and conditions known to the party to whom it is imputed. *Brown v. Railroad Co.*, 111 Ala. 275, 19 South. 1001; *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041. The evidence of the appellee, which the jury evidently believed, shows that he did not know the tank had been separated from the engine. Con-

sequently, he could have known nothing of the danger to which he was exposed. But appellant contends that the tank could not have been pushed back when he was on the engine without his knowledge, because he must have heard the noise necessarily incident to detaching and moving it, from the engine. This was a question for the jury to determine, not for us. The roundhouse was filled with the din and noise incident to the many different kinds of work in progress there. And it may be that if appellee heard the noise made in moving the tender he did not know where it came from, or, if he knew its source, that he did not know that it indicated the tender was being moved. This was for the jury to determine, and to enable them to do so the question necessarily had to be submitted by the court in its charge. As illustrative of the principle that it was the duty of the court to submit the question of contributory negligence, we cite the case of *Perras v. Booth & Co.* (Minn.) 84 N. W. 739. In that case the evidence was that A. Booth & Co. maintained a warehouse for the storage of goods. The building was several stories high, with a basement for cold storage. A door opened from the rear of the building, on the ground floor, upon a railroad side track. Inside the building, at this door, was a freight elevator, used in receiving goods from railroad cars, and conveying them to the upper stories, or to the cold-storage rooms in the basement. It was the custom in unloading goods from the cars to connect the sill of the door with the floor of the car with an iron plate, forming an inclined plane from the car to the door sill, which was a few inches lower than the car. When unloading the cars the elevator was held stationary on a level with the doorsill, so that the hand trucks used in conveying the goods from the car ran down the iron plate into the elevator without obstruction. The elevator shaft extended into the basement about 10 feet. The doorway was protected by an outer door and an inner gate, but was not kept closed when the elevator was being used in connection with unloading cars. With the elevator away there was nothing to obstruct the entrance to the elevator shaft from the outer door. One of the company's servants, who frequently assisted in unloading cars, was ordered by the foreman to assist another employee in unloading a car of fish. He commenced the work of transferring the fish therefrom to the cold-storage rooms in the basement, the outer door leading to the elevator shaft being open and fastened. After the work had been going on some time, the foreman, without notice or warning to the servants unloading the car, pulled the elevator up to the third floor. The servant, who did not know the elevator had been removed, wheeled a truck loaded with boxes of fish from the car upon the iron plate, and, in lowering the truck to the elevator, walked backwards, his face being to the truck and his back to the elevator. He did not notice that the elevator had been removed until it was too late to save him-

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self. He was precipitated into the elevator shaft and killed. The defenses of the company to an action brought by the servant's administrator were (1) assumed risk, (2) negligence of a fellow servant, and (3) contributory negligence. On appeal from a judgment on a verdict peremptorily instructed for the company, the supreme court of Minnesota held that the questions of assumed risk and contributory negligence should have been submitted to the jury, and reversed the judgment of the trial court because of its failure to submit them. The constitutional provision of this state, which provides that the right of trial by jury shall remain inviolate, means something more than a mere empty form of such a trial. It asserts and gives a substantial right. The supreme court has steadily held that where there is any evidence tending to support an issue it is the duty of the trial court to submit it to the jury, and that if the evidence is reasonably sufficient to support the verdict it should not be disturbed. In view of this constitutional right, and the decisions of the court of last resort in this state, we are not prepared to hold that a servant, placed to work by his master on a deck which is perfectly safe and furnishes ample room to perform the service, who, without warning or notice of the danger caused by a removal of a part of it at the instance of his employer, steps back without looking and falls into a pit, is guilty of contributory negligence as a matter of law.

The court did not err in submitting the case to the jury. Its charge presented fairly all the issues raised by the pleadings and evidence, and is, upon the measure of damages, in perfect harmony with the decisions of the supreme court. The evidence is reasonably sufficient to sustain the verdict, and it is not excessive. Therefore the judgment is affirmed.

CHICAGO & A. RY. CO. v. EATON.

(*Supreme Court of Illinois, Feb. 21, 1902.*)

[62 N. E. Rep. 784.]

Killing of Brakeman—Derailment—Rule Requiring Flags and Torpedoes as Evidence of Their Necessity.

Plaintiff's intestate, who was an engineer in defendant's employ, was killed by the derailing of his engine caused by the removal of a rail by defendant's trackmen. Defendant had a rule requiring that when a rail was removed a flagman or a red flag must be stationed, and torpedoes placed on the rail on the engineer's side, in each direction 2,000 yards, and on a down grade twice that distance, from the removed rail. Defendant's section force and steel gang, who were near the place where the rail was removed, signaled deceased to stop as his engine came around a curve, on a down grade, but though deceased made every effort to stop he could not do so. No torpedoes had been placed, and the evidence as to whether flagmen or red flags were stationed was conflicting: *held*, that the adoption by defendant of its rule as to flags and torpedoes

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was an admission that ordinary care required the course of conduct therein prescribed.

Same—Same.

The jury would have been justified in finding that, if this rule had been obeyed, the accident would not have happened.

Right to Rely on Compliance with Rule Requiring Flags and Torpedoes.

There being testimony that a bulletin had been delivered to deceased, warning him to look out for the "steel gang," even if he received this bulletin, he had a right to rely upon defendant complying with its rule, and to assume that a flagman, a red flag, or torpedoes would be placed as provided in the rule, and that in their absence he could safely proceed as he did.

Negligence and Contributory Negligence—Questions for Jury.

There being evidence tending to prove defendant's negligence and ordinary care on the part of deceased, these questions were for the jury, and there was no error in refusing to take the case from them.

Duty to Furnish Safe Track Nonassignable.*

It being the nonassignable duty of defendant to furnish deceased with a reasonably safe track upon which to operate his engine, and to notify him of the removal of the rail, the question of fellow servants' negligence was properly eliminated from the case by the lower court.

Contributory Negligence—Instructions.

The first and second instructions offered by defendant being that if the jury believed that the "conduct" of deceased contributed to his injury plaintiff could not recover, and its third being that if they believed that the "failure" of deceased to obey or to attempt to obey the stop signal did so plaintiff could not recover, the modification of these instructions by striking out the word "conduct" in the first two, and inserting the word "negligence," and by inserting the word "negligent" before the word "failure," in the third, was proper.

Cross-Examination.

The refusal to allow a witness to be recalled for further cross-examination, when he had been fully examined upon the subject as to which he was sought to be recalled, was not an abuse of the court's discretion in such matters.

Appeal from appellate court, Third district.

Action by Statia B. Eaton, administratrix, against the Chicago & Alton Railway Company. From a judgment of the appellate court (96 Ill. App. 570) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Defendant's first and second instructions, which were changed by the court, were that, if the jury believed that the "conduct" of the deceased contributed to his injury, plaintiff could not recover. Defendant's third instruction, which was changed by the court, was that, if the jury believed that the "failure" of the deceased to obey or attempt to obey the stop signal contributed to his injury, plaintiff could not recover.

A. E. De Mange and Wm. Brown, for appellant.

Louis Fitz Henry and Barry, Morrissey & Fifer, for appellee.

HAND, J. This is an action on the case brought by the appellee, as administratrix, to recover damages by reason of the death of her intestate, Charles Eaton, alleged to have been caused by appellant in having a rail removed from its

*See 12 Am. & Eng. Enc. Law (2d Ed.) 954 et seq.

main track, between Atlanta and Lawndale, without giving him notice thereof as he approached it as engineer of a locomotive pulling a freight train composed of about 60 cars, some of which were loaded, whereby said engine was derailed. The jury returned a verdict in favor of the appellee for \$5,000, upon which the court rendered judgment, which judgment has been affirmed by the appellant court for the Third district, and a further appeal has been prosecuted to this court.

At the time of the injury the appellant had in force a rule requiring that when a rail is taken out a flagman or red flag must be stationed in each direction 2,000 yards from that point, and two torpedoes placed on the rail on the engineer's side. If in the vicinity of a descending grade, the distance must be doubled. The train upon which Eaton was engineer left Bloomington on the morning of October 16, 1900, going south. At that time the trackmen of appellant, consisting of two gangs, were working about a mile and one-half north of Lawndale, taking up and relaying track, the section men being a short distance north of the steel gang. The steel gang had removed a rail. It is not claimed any torpedoes were laid, and there is a conflict in the evidence as to whether a flagman or red flag was stationed as required by the rule. The section men and steel gang, as the train approached around a curve coming down grade, gave signals to stop; but although the deceased made every effort to stop the train after receiving such signals he was unable to do so, and the engine ran into the gap where the rail had been taken out, and turned over, and Eaton was caught beneath the same and killed.

It is first assigned as error that the court declined to instruct the jury to find for the defendant. If there is evidence tending to establish a cause of action, a peremptory instruction should be refused. *Edison Co. v. Moren*, 185 Ill. 571, 57 N. E. 773. A plaintiff is entitled to have his case considered by the jury if the evidence tends to prove ordinary care on his part and negligence on the part of the defendant. *Railroad Co. v. Sanders*, 166 Ill. 270, 46 N. E. 799. Whether appellant was guilty of negligence or the deceased of contributory negligence are questions of fact for the jury, and the adoption of the rule above referred to is an admission by appellant that ordinary care required the course of conduct prescribed therein (*Railway Co. v. Ward*, 135 Ill. 511, 26 N. E. 520), and the jury would have been justified in finding that if said rule had been obeyed the accident would not have happened (*Railway Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208). The train dispatcher at Bloomington testified that just before the train left, on the morning of the accident, he gave to Eaton a bulletin which read, "Look out for steel gang between Lincoln and Atlanta." No such bulletin was delivered to the conductor, and none was found upon the body of Eaton, although his clothing was examined immediately after his death. But if it be conceded that he did receive the bulletin he had the right to rely upon

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appellant complying with its rule, and, relying upon it, he had the right to assume that a flagman or red flag would be stationed and torpedoes placed upon the rail at the place and in the manner therein provided, and that in the absence thereof he could safely proceed in the manner in which he did. *Railroad Co. v. Kelly*, 182 Ill. 267, 54 N. E. 979. The court did not err in declining to take the case from the jury.

The giving of appellee's first instruction and the refusal of appellant's third and seventh instructions are assigned as error, on the ground that the court thereby eliminated from the case the fellow servant question. We do not think the court erred in eliminating that question, as the question of fellow servant is not in the case. It was the duty of appellant to furnish the deceased a reasonably safe track upon which to operate his engine, and it could not delegate that duty. Neither could it delegate the duty of notifying the deceased that the rail had been removed, so as to absolve itself from liability for a failure to communicate such information to the deceased. *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Railway Co. v. Rice*, 144 Ill. 227, 33 N. E. 951. In *Drymala v. Thompson*, 26 Minn. 40, 1 N. W. 255, a section foreman had taken up a rail in repairing a track, and failed to put out a signal to warn approaching trains, whereby a train was thrown off, and a brakeman injured. The court say (page 42): "In the instance of a railroad, the track is one of the instrumentalities for the working of the road, and therefore something which it is the absolute and personal duty of the master to employ due care in maintaining and keeping in a condition suitable to the purposes for which it is to be used; that is to say, in such condition that it can be safely used for such purposes. * * * When such master intrusts the performance of this duty to a servant or agent, such servant or agent occupies the place of the master as respects such performance, and the negligence of such servant or agent in performing the duty is the negligence of the master himself."

The modification of appellant's first, second, and third instructions, by striking out the word "conduct" and inserting the word "negligence," was proper, and the refusal of the court to allow the appellant to recall the witness Wilson for further cross-examination was a matter resting in the sound discretion of the court, and was not, in our judgment, abused. He had already been fully cross-examined upon the same subject-matter when upon the stand before.

We find no reversible error in this record. The judgment of the appellate court will be affirmed. Judgment affirmed.

GALVESTON, H. & S. A. RY. CO. v. HITZFELDER.*(Court of Civil Appeals of Texas, Oct. 10, 1900.)*

[66 S. W. Rep. 707.]

Personal Injuries—Sufficiency of Complaint.

In an action by a railroad employee for personal injuries, a complaint averring that by reason thereof plaintiff's "skull was crushed and his face and head badly cut and lacerated; that * * * his brain and mind have been violently affected, and his injuries have directly produced epilepsy"; that "plaintiff was compelled to submit to a dangerous operation, whereby a part of his skull was removed; * * * that, notwithstanding this, the epilepsy continues, and his mental and physical condition unfit him for performing any physical or mental labor, and will continue as long as plaintiff lives; * * * that he has, in mind and body, become so weakened as to be almost an invalid," etc.,—sufficiently shows the nature of the injuries sustained by the plaintiff.

Excessive Verdict—Jury's Sympathy Aroused by Witnessing Epileptic Fit.

Where there was evidence that shortly after the injury plaintiff had had violent epileptic convulsions, and that his condition was due to his injuries, the fact that during defendant's testimony plaintiff fell down in the court room in an epileptic convulsion, and caused some excitement, in the presence of the jury, was not ground for setting aside a verdict in his favor on the ground that his condition had aroused the jury's sympathy and prejudiced defendant's case, where only \$10,000 was awarded him.

Instructions.

The court, in charging the jury, is not required to make a brief presentation of the issues raised by the pleadings, as a preface to the law embodied in the charge, where the issues are sufficiently pointed out during its course.

Assumption of Risk of Working under Tender as Affected by Inexperience.*

In a suit by a railway employee for personal injuries, where plaintiff, a mere boy, testified that, while working under a tender at his foreman's order, the tender was moved, and the injury inflicted; that he had never done such work before, and did not know that there was any danger,—a charge that plaintiff had assumed the risk was properly refused, because ignoring the question of his lack of knowledge.

Appeal from Bexar county court; S. J. Brooks, Judge.

Action by August Hitzfelder against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Upson, Newton & Ward, for appellant.

Nat. B. Jones and Lewis & Carter, for appellee.

FLY, J. Appellee instituted this suit to recover of appellant the sum of \$30,000, alleged to have accrued by reason of personal injuries inflicted through the negligence of appellant. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee for \$10,000.

We find that in 1893, appellee, at the time 15 years old,

*Assumption of risk as affected by absence of knowledge of danger, see 20 Am. & Eng. Enc. Law (2d Ed.) 122 et seq.; 5 Rap. & Mack's Dig. 149 et seq.

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while engaged in the service of appellant as its employee, was permanently and seriously injured through the negligence of appellant, and sustained damages in the sum found by the jury.

Appellee alleged that he was a minor, without experience, and was employed by appellant as an apprentice in its paint shop, under the supervision and control of H. L. Darnell, who was foreman of the paint shop; that, on the date of the accident, appellee was ordered by said foreman to go under the tender of an engine for the purpose of holding up a brake beam on the tender, and while he was under the tender the foreman caused the tender to be moved in such a manner as to bring the brake beams violently together, crushing his skull and lacerating his face. The appellee further sets forth the nature of his injuries as follows: "Plaintiff alleges that by reason of the aforesaid injuries his skull was crushed, and his face and head badly cut and lacerated; that, by reason of the injuries to his head, his brain and mind have been violently affected, and his injuries have directly produced epilepsy, from which he constantly suffers, and, for the purpose of helping his mental and physical condition and attempting to relieve his epilepsy, the plaintiff was compelled to submit to a dangerous operation, whereby a part of his skull was removed in order to lessen the pressure upon his brain; that, notwithstanding this, the epilepsy continues, and his mental and physical condition is such as to unfit him for performing any physical or mental labor or attending to any business, and such condition is permanent, and will continue as long as plaintiff lives. Plaintiff alleges that by reason of said injury he has, in body and mind, become so weakened as to be almost an invalid, and that such condition is permanent; that by reason of said injuries he has constantly suffered, and will continue to suffer, for all his life, great mental and physical pain. Plaintiff avers that prior to his injuries he was strong and healthy, and able to earn about \$50 per month, which would have increased as he grew in years and experience, but since his injuries he has been unable to work, and said injuries will permanently destroy his capacity to ever work again. Premises considered, plaintiff says he has been damaged in the sum of \$30,000, for which he prays judgment, together with costs and general relief." Appellant excepted to the portion of the petition above copied, on the ground that the allegations were conclusions, and did not apprise appellant of the grounds on which damages were sought to be recovered. The exceptions were properly overruled. The petition clearly set forth the nature of the injuries, and gave full notice to appellant of the case it would be called upon to meet.

After appellee had testified that he had been subject to epileptic fits since the injuries to his head had been inflicted, and after he had closed his testimony, and testimony was

being introduced by appellant, appellee fell down in the court room in an epileptic convulsion, and caused some excitement, in the presence and hearing of the jury; and appellant asked that the cause be withdrawn from the jury, and the trial postponed, on the ground that the condition of appellee may have aroused the sympathy of the jury and prejudiced the cause of appellant. The motion was overruled, and appellant complains of the ruling of the court. There was no conflict of evidence as to the fact that appellee had been having violent epileptic convulsions from a time shortly subsequent to the time that he received the injuries to his head from the brake beams of the engine tender, and it does not appear how the convulsion in court could have intensified the evidence on the subject; but, if the evidence had been contradictory on the subject, there is nothing in the record that indicates that appellant was injured by it. If, as the proof tends to show, appellee's condition was attributable to the injuries to his head received through the negligence of appellant, there is no evidence of passion or prejudice deducible from the size of the verdict. A more pitiable case can scarcely be conceived of than that presented by the testimony, but there is nothing in the amount of the verdict that tends to show the least sympathy for appellee or prejudice against appellant. The rule that compensation should be the end attained in giving damages has not been infringed in any manner to give just cause of complaint to appellant.

The court did not, in the charge, preface the law of the case by a statement of the issues raised by the pleadings, and this is assigned as error. While it is customary and proper for trial courts to make a brief presentation of the issues raised by pleadings, as a preface to the law embodied in the charge, there is no rule requiring a court to make such presentation, and a charge could not be held defective on the ground that it failed to make such preface. It is undoubtedly the duty of the trial court, in giving a charge, to present to the jury the law applicable to the issues raised by pleadings and evidence, and it may be true that this may be more satisfactorily done by first stating the issues raised by the pleadings and evidence, and then applying the law to such issues; but, if the application of the law is properly made to such issues, it would not follow that the absence of the statement of the issues by way of preface would constitute such error as would necessitate a reversal. Had there been an attempt and failure to point out the issues raised, there might be cause of complaint, but there is no authority to sustain the contention of appellant. Indeed, in one of the cases cited by appellant (*Railway Co. v. Tankersley*, 63 Tex. 60), the court refused to reverse on the ground contended for in this case. We think the issues in this case were sufficiently submitted in the different paragraphs of the charge, and that the jury obtained as full an understanding of them as would have been obtained from a preface enumerating the issues.

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The contention that appellee's side of the case was given undue prominence in the charge is not well founded. The court, in its charge, presented every defense made by appellant to the jury, and, in addition, gave numerous special charges requested by appellant. Only one charge was refused, and properly so, as it was upon the weight of the evidence, and was not the law of the case. There was evidence tending to show that appellee, a mere boy, was not apprised of the danger of going under the tender; and the fact that he did go under it, standing alone, did not justify a verdict for appellant, as stated in the rejected charge. It ignored the question of the lack of knowledge on the part of the boy altogether. Appellee testified that he was ordered by Darnell, his foreman, to go under the tender, and that while he was under it the tender was moved and the injury inflicted. He swore that he had never been called upon to do such work before, and did not know that any danger attended his going under the tender, and in this statement he was not contradicted. Under such a statement of facts, it was obviously improper to charge that he had assumed the risk incident to going under the tender. The court properly presented the question as one of fact to be determined by the jury.

The assignments of error raising the question of the sufficiency of the evidence are disposed of by our conclusions of fact.

We do not think any error is shown by the record, and the judgment will be affirmed. Affirmed.

LOUISVILLE & N. R. CO. v. RICHARDSON.

(*Court of Appeals of Kentucky, Feb. 13, 1902.*)

[66 S. W. Rep. 631.]

Injury to Employee—Negligence in Using Wooden Fulcrum.

Where plaintiff, while employed in defendant railroad company's machine shops in repairing an engine, was injured by the displacement of a wooden fulcrum, the allegation in the petition that it was gross negligence to use a wooden fulcrum was sufficient without any allegation that a defective piece of wood was used, or that an iron or steel fulcrum would have been safer, though it was unnecessarily alleged that an iron or steel fulcrum should have been used.

Same—Same—Right to Rely on Master's Judgment.*

The rule requiring plaintiff to allege that he could not, by the exercise of ordinary care, have known, or that he did not have an equal opportunity with the master to know, that the appliance was defective or unsafe, and that the master knew, or could by the exercise of ordinary care have known, that the appliance was defective or unsafe, does not apply, as plaintiff had the right to rely upon the judgment of the master as to the kind of fulcrum to be used.

Variance.

Proof which authorized the jury to conclude that the fulcrum either split or slipped was sufficient to sustain an averment that the block of wood was "displaced," and therefore there was no variance.

*See 20 Am. & Eng. Enc. Law (2d Ed.) 138 et seq.

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Care Required in Furnishing Appliances.*

While the master is not bound to furnish appliances which are absolutely safe, but only those which are reasonably safe, the jury was authorized to conclude there was negligence where the master furnished an iron or steel fulcrum to raise a heavy engine, and the foreman, contrary to his own judgment, used a wooden one.

Appeal from circuit court, Warren county.

"Not to be officially reported."

Action by W. W. Richardson against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Mitchell and Edward W. Hines, for appellant.

B. F. Proctor, Hazelrigg & Chenault, and G. H. Herdman, for appellee.

PAYNTER, J. The appellee, W. W. Richardson, instituted this action against appellant to recover damages for injury which he received while acting as a helper in its shops at Bowling Green. It is averred in the petition that, whilst he was assisting in making repairs on one of its engines, the defendant, by its agent's gross negligence, caused him to be struck by a heavy piece of iron, with which he was assisting in raising an engine. By an amended petition, it was averred that Lee Huddlestone was the foreman; that the foreman ordered him to assist in making repairs on the engine; that in order to raise it it was necessary to put a fulcrum under the end of a long iron bar used as a lever; that the foreman used a wooden block as a fulcrum; that he placed it between the end of the bar and the frame of the engine, and then ordered him and several servants to pull down upon the bar, which he did, and while so doing the fulcrum was displaced, and the bar struck him, and caused his injury. It is averred that the fulcrum should have been of steel or iron, and that he did not know until after his injury that a wooden block had been used. The trial resulted in a verdict and judgment for \$1,600 against appellant.

Several grounds are urged for a reversal, and we will consider them in the order discussed by counsel for appellant. The petition stated the cause of action, and it was unnecessary to file an amendment. The amendment sets out the circumstances under which the injury was inflicted, and, from the averments made, the injury was inflicted by a bar of iron used as a lever; that the displacement of the wooden fulcrum was the cause of him being struck by the iron bar. It is true the petition does not allege that the wooden fulcrum was defective or unsafe, but it is averred that it was gross negligence to have used it at all. It is suggested that it is not averred that the use of the wooden fulcrum involved any greater danger than the use of an iron or steel fulcrum would

*As to the care required of the master in furnishing appliances, see 5 Rap. & Mack's Dig. 67 et seq.; 20 Am. & Eng. Enc. Law (2d Ed.) 71 et seq.

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have involved. It is true that this averment is not made. The plaintiff simply made an unnecessary averment that a steel or iron fulcrum should have been used. By the averment the plaintiff unnecessarily advised the defendant that, in his effort to show that the use of the wooden fulcrum was gross negligence, he would prove that a steel or iron one should have been used in its stead. The plaintiff does not aver that the negligence consisted in using a defective piece of wood, but in the use of a wooden one at all.

Again, it is claimed that the petition is defective because there is no allegation that the plaintiff could not by the exercise of ordinary care have known, or that he did not have an equal opportunity with the foreman to know, that the appliance was defective or unsafe, and that defendant or its foreman knew, or could by the exercise of ordinary care have known, that the appliance was unsafe. It is claimed that under the doctrine of *Bogenschutz v. Smith*, 84 Ky. 339, 1 S. W. 578, these averments should have been made in the petition. In that case the court stated a general rule, and applied it to the facts of that case; but the court said: "We do not mean to decide that there may not be cases where the servant has a right to rely upon the judgment of the master as to the safety of the premises or the material to be used, or that the servant is bound to inform himself as to them." We are of the opinion that the general rule stated in that case is not applicable to this case. This case belongs to the class which the court in that case recognized as being an exception to the rule. The plaintiff had the right to rely upon the judgment of the master as to the kind of fulcrum should be used. It was not the duty of the servant to see or examine the fulcrum before it was used. It was the business of the foreman to select and put the fulcrum in use. Besides, the plaintiff averred that he did not even know that a wooden fulcrum was used until after his injury.

It is urged that a peremptory instruction should have been given. There was testimony offered by the plaintiff which tended to show that it was not safe to use a wooden fulcrum. The evidence fails to show whether the block of wood was displaced by slipping or splitting; therefore it is urged that there was a fatal variance, in view of the fact that it was averred in the petition that the block of wood was "displaced." It seems to us that the averment of the petition that it was displaced was sustained by proof which authorized the jury to infer that it either split or slipped. There is some conflict in the testimony as to whether it was safer to use a wooden or metal fulcrum. The testimony all tended to show that a metal fulcrum was generally used. While they were looking for a fulcrum to use, the car inspector picked up the wooden block which was used; whereupon Huddleston at first declined to use it, because he feared it was not safe to do so, but he did use it with the result stated. When the fulcrum

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was displaced, the end of the iron lever struck plaintiff in the breast, inflicting an injury which resulted in consumption, and the probable loss of his life.

The question as to whether the appellee was guilty of negligence except for which the accident would not have happened was fully submitted to the jury. The instructions in no part were prejudicial to appellant, but in some respects they were more favorable to it than it was entitled to have given the jury.

We recognize that a master is not bound to furnish appliances which are absolutely safe, but is only required to furnish those which are reasonably safe. *Lawrence v. C. C. Hagemeyer & Co.*, 93 Ky. 594, 20 S. W. 704. In this case a ponderous piece of machinery was to be raised. The appellant recognized that it was necessary to use iron or steel fulcrum in doing so; hence provided them. Notwithstanding this, the foreman of the appellee, contrary to his own judgment, used a wooden one, which resulted in the injury to appellee. We think, under these circumstances, that it cannot be said that the verdict of the jury is flagrantly against the weight of the evidence.

The judgment is affirmed.

LOUISVILLE & N. R. Co. *v.* LOWE.

(*Court of Appeals of Kentucky, Feb. 19, 1902.*)

[66 S. W. Rep. 736.]

Car Inspector Injured by Engine in Railroad Yards—Lookouts—Signals.

The servants in charge of an engine in a railroad yard owed to a car inspector the duty of giving signals of the approach of the engine and of keeping a lookout.

Same—Contributory Negligence.

Whether the car inspector was guilty of contributory negligence was a question for the jury; and the question was also properly submitted to the jury whether, notwithstanding his negligence, those in charge of the engine, after they perceived his danger, or should have perceived it, by the exercise of ordinary care, might not have avoided the injury to him.

Same—Fellow Servants.*

The car inspector and the men in charge of the engine were not fellow servants, and, being in different departments of work, the master was liable for an injury to the car inspector resulting from the ordinary negligence of the men in charge of the engine.

Excessive Verdict.

A verdict for \$13,000 for the loss of an arm by plaintiff, who was 34 years of age and earning \$1 a day, is excessive.

DuRelle, Burnam, and O'Rear, JJ., dissenting in part.

Appeal from circuit court, Washington county.

"To be officially reported."

*As to the different department limitation of the fellow-servant rule, see *Louisville & N. R. Co. v. Stuber* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 840, and note, 847 et seq.

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Action by William S. Lowe against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

W. C. McChord, H. W. Bruce, W. D. Hines, B. D. Warfield, and Edward W. Hines, for appellant.

J. W. S. Clements and I. H. Thurman, for appellee.

HOBSON, J. Appellee, Wm. S. Lowe, was in the service of the appellant, the Louisville & Nashville Railroad Company, as assistant inspector of trains at Lebanon Junction, which is a town of about 1,200 inhabitants, at the junction of the Knoxville branch with the main line of appellant's road. There is maintained at this place a railroad yard, containing an extensive system of side tracks, used in making up freight trains going out of the yards. The regular trains, too, pass over the main tracks, and are sometimes switched on the side track; so that cars are moving about the yard pretty much all the time. A switch engine is kept in the yard for the purpose of switching cars and making up trains. Large coal bins are maintained there by the appellant, at which all engines are supplied with coal. Perhaps as many as 150 engines, including the different passages of the switch engine, pass across the yard every day. The coal bins are north of the station, and in a curve of the track, so that an engine beyond a certain point cannot be seen south of the bins. Appellee had been the watchman in the shops for about six weeks before he was made assistant car inspector. On the 12th of September, 1899, which was the first day that he served as car inspector, he went on duty at 6 p. m., and inspected a freight train then ready to go out southward on the Knoxville branch. The train was standing on a side track east of the main track, fronting south. He began at the engine on the west side of the train, and inspected the cars, going back from one to another until the inspection was finished, when the train pulled out. The tool house to which he was then to go was on the east side of the tracks, and south of the point where he then was. So he walked southward along by the side of the departing train, and when the side track merged in the track next west of it he got over on that track, and then on the main track. While he was walking southward on the main track, an engine and tender, backing down on that track, ran upon him in the rear, knocking him down, cutting off his right arm, and inflicting severe bruises, for which injuries he recovered damages in the sum of \$13,000. The evidence introduced by him on the trial tended to show these facts: The track was straight for some distance, and appellee, walking along with his back to the engine, could have been seen by the persons on it for some distance if a proper lookout had been kept. The tender had been loaded with coal at the coal bin. The coal was piled up higher than the engineer's head, so that his line of vision did not reach the track, but rose

above the track the further it was prolonged, and he was therefore unable to see anything on the track in front of him. A passenger train from the south was just about due on the main track, and appellee supposed that no other train would be on that track, so he kept a lookout in front of him for it, but did not look behind him after he started south. When he turned and started south, he looked back, and, seeing nothing, supposed the way was clear. The engine by which he was hurt was then standing at the coal bin around the curve. After taking coal it came rather rapidly southward, in order to get off the main track before the arrival of the passenger train from the south. Appellee's proof tended to show that no signal was given of the movements of this engine, and that it was run substantially without any lookout in front of it. The proof is conflicting as to whether signals were given by the ringing of the bell and as to the speed of the train, but the evidence for appellee shows that the engine was running at something like 12 or 15 miles an hour. When it stopped after running over appellee, it was just even with the engine of the outgoing freight train by the side of which he had been walking, and had, therefore, run something like a quarter of a mile more than that engine after it started and appellee turned and began to walk south. When it stopped it had only one minute to get in on the side track in time, according to appellant's proof. Appellee could not go directly to the tool house because the outgoing freight train was between him and it. He perhaps got on the main track thinking no other train, except the passenger train from the south, could properly be on that track at that time, and this would be in front of him. There is some evidence from which it is argued that the time had already expired when any other train, under the rules, might properly use the main track. The men in charge of the engine did not see appellee at all, and did not know that he was hurt until informed by others.

Appellant complains that the court refused to instruct the jury peremptorily to find for it. It also complains of the instructions given by the court. The court, in substance, instructed the jury that if they believed from the evidence that appellee at the time he received the injuries was upon appellant's track in the usual course of his employment, and that its agents in charge of the engine and tender that injured him negligently failed to ring the bell or give other signal of its approach, or negligently failed to stop it after they saw his peril, or after they might have seen it by the use of reasonable care, then they should find for the plaintiff, unless they believed from the evidence that he, by his own negligence, contributed to such an extent to the injury that, but for his negligence, it would not have happened, and that in this event he could not recover, unless appellant's agents in charge of the engine and tender knew, or could have known by ordinary attention, of the peril in which his negligence had placed him,

and thereafter failed to observe reasonable care to avoid the injury which followed. It is earnestly maintained for appellant that the evidence shows no negligence on its part; that, as to appellee, it was not required to give notice of the movement of its trains or keep a lookout for him in moving them. In support of this view we are referred to a number of decisions in other jurisdictions; but, without discussing them, we conclude that the rule has been so often held otherwise in this state that it is no longer an open question. Appellant has at Lebanon Junction something like 200 employees. The place at which appellee was injured is used by them to a great extent in coming and going. The proof presents a case where the presence of persons on the track should reasonably be anticipated by those in charge of the train. The point was not far from the station, between it and the coal bins, and where a great many people passed back and forth, especially during the day. In *Shelby's Adm'r v. Railroad Co.*, 85 Ky. 224, 3 S. W. 157, the intestate was in the yard of the railroad at Junction City for the purpose of soliciting employment in watering stock, and was run over by a train backed without signal or outlook. The place was not so much traveled as in the case before us, and the intestate was barely a licensee, and yet the court held the company liable. After showing that increased vigilance and precaution are required, the court said: "But it is obvious that neither the duty of giving the warning of the approach of the trains nor of resorting to the proper and necessary means to prevent collision with persons can be performed unless there be some one in a position to see ahead of the train and control it." In *Conley's Adm'r v. Railroad Co.*, 89 Ky. 402, 12 S. W. 764, the intestate was killed in like manner by a backing train as he was crossing the track, and the case is discussed on the idea that he was technically a trespasser. The court held the company liable, and said: "A train of running cars (these were running, according to the appellant's proof, at the rate of about fifteen miles per hour) is more dangerous to the life of persons with whom it comes in contact than that of the most ferocious and powerful wild animal. And certainly it cannot be lawfully turned loose to run by itself, and expose persons that may be on the track, either by accident, mistake, or design, to its destructiveness. Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief even to a technical trespasser. * * * It is the duty of the citizen not to knowingly do an act that will hazard human life and safety unless it is done to prevent crime. If the appellee had turned loose on the track a ferocious bull to run down it, and in running down it it had killed the appellant's intestate, would it be doubted that the appellee would be liable in damages for the injury, although the intestate was a trespasser? * * * It

may be said that the parallel between the case just put and the running of the train is wanting in the fact that the running of the train is a business operation, and is governed as to the matters of damages for a violation of prudential business rules and obligations, and in the case put the parties are held responsible for violating police duties and obligations. As a general proposition, this distinction is correct. But here the train, possessing most destructive power, contrary to a manifest duty, is turned loose to run unlighted and uncontrolled, and kill all persons, whether trespassers or not, that may be overtaken by it. Such conduct is a violation of a manifest duty to the public—trespassers and all—not to turn such a power loose." In *Railroad Co. v. Potts*, 92 Ky. 30, 17 S. W. 185, the deceased was in the employ of the railroad company at Junction City, a town of about 400 people. It was his duty to enter in a book the numbers of the cars standing on the side tracks, and point out to the engineer those he was to take up. While standing on one of the tracks, he was run over and killed by some cars detached from the engine, moving up behind him, without any lookout or signal of their approach. The court said: "The *Shelby Case*, 85 Ky. 224, 3 S. W. 157, which occurred in the same town, and the *Conley Case*, 89 Ky. 402, 12 S. W. 764, seem conclusive of the question. It is held in those cases that neither a train nor a single car should be permitted to move on a side track in a city or town without some servant is in position to give warning of its approach and to control its movements. * * * It was as essential that the servant should be in a position thus to see and give warning as it was to be in a position to control the cars." In *Barber v. Railroad Co.* (Ky.) 21 S. W. 340, the intestate was in the service of the railroad company getting out ballast near High Bridge, Ky. The quarry was on the west side of the track, and to obtain a suitable place for piling the rock he had to wheel it across the track, and along by the side of it a short distance, to a point on the east side, and for that purpose was required to place plank across the track on which to run his wheelbarrow. Warning signals by the train to laborers working on the road were required by the rules of the company. But no signal was given of the approach of the train, and when it was very close to the intestate he ran to the track, and tried to move the plank, to avoid danger of the train's being derailed. In doing this he was killed. The men in charge of the train knew of the labor done at this point and the mode of doing it. The trial court gave a peremptory instruction to the jury to find for the defendant, but on appeal this was reversed. In the subsequent case of *Railroad Co. v. Mahan* (Ky.) 34 S. W. 16, Mahan was the telegraph operator at Arlington, and received orders to stop an extra train. It disregarded his signal to stop, and he, seeing that a collision was inevitable with a passenger train coming in the opposite direction, unless the order to stop was

obeyed, seized a lantern, and followed the train some 30 yards, waving his light. It stopped, and the conductor came back to him. The extra then backed in off the main track to get out of the way of the approaching passenger train, and they also got off the main track to let that train pass. In doing this they got on the side track, and while standing there the train which he had stopped continued backing down on the side track without any lookout or signal of its approach, and ran over him. Judgment in his favor was affirmed. The court said: "If, in the emergency which seemed to confront him, the appellee got on the side track, or too close to it, when there was space elsewhere within which to stand or walk and give his signals to the approaching passenger train, he was, perhaps, guilty of negligence, but for which the injury would not have occurred. Yet it is manifest that by the exercise of ordinary care on the part of those controlling the backing train the danger could have been discovered and the injury averted. By witnesses in the service of the appellant it is shown to have been the duty of those operating the extra to have had a brakeman on the rear of the backing train, who might give warning of its comparatively noiseless approach; and it is no excuse for the failure to make such provision in this instance to say that the company was using instead of the usual caboose a box car, which did not conveniently admit of this customary precaution. The necessary care was not exercised on this occasion, and the failure to exercise it was gross negligence."

These cases control the one before us, for the danger from want of signals of the approach of the train or outlook in front of it was greater in this case than in any of them under the evidence. The same rule has been announced elsewhere. Thus, in 2 Thomp. Neg. § 1839, it is said: "Persons lawfully at work in repairing a railway track, or in repairing a highway where it crosses a railway track, cannot be expected to pursue their labors and at the same time maintain a constant lookout for an approaching train. They are passive, and are not a source of danger to the train. Those who are driving the train are active, and are handling and are in control of the instrument of danger and mischief. The obligation of reasonable care which the law puts upon the railway company under these circumstances therefore demands nothing less than an active vigilance in favor of persons thus lawfully at work upon the track, and the giving of seasonable danger signals to arouse their attention and enable them to get out of the way before it is too late." In sections 1840-1842 it is shown that the same rule applies in favor of the servants of a contractor, or persons engaged in loading or unloading cars or receiving mail or express matter. In section 1846 the care required in moving trains through cities and towns is pointed out, and it is laid down to be negligence, when a train is moved backwards, not to have a person keeping a lookout. See, also, 2 Shear. & R. Neg. §§ 457, 458. If appellant had

fired a Winchester rifle down the track, or shot off a dynamite cartridge near by, without precaution to avoid injury to others, and had thus maimed appellee, it would hardly be supposed to be blameless. But a rapidly moving locomotive is as deadly as either of these, and it is no answer for appellant to say that a railroad track is necessarily a place of danger where locomotives are to be expected; for where persons are rightfully on the track, and the nature of the place is such that the presence of persons thereon should reasonably be anticipated, the security of life requires the railroad company to exercise its rights with such regard for their safety as not unnecessarily to endanger them. Cases are not wanting in which railroad companies were held responsible for sending loaded cars along their tracks at such places with no one on them to control their movements or give warning of their approach. *Kay v. Railroad Co.*, 65 Pa. 269, 3 Am. Rep. 628; *Railroad Co v. McGinnis*, 71 Ill. 346; *Bohan v. Railway Co.*, 58 Wis. 30, 15 N. W. 801. A locomotive is practically run in the same way when those in charge of it give no signals and maintain no lookout. The case of *Railroad Co. v. Dick*, 91 Ky. 434, 15 S. W. 665, is not inconsistent with the above. In that case Dick was only a licensee to cross the track. For his own convenience, he left the usual way of crossing, and was walking along the track. He had no right to be where he was; at least there is nothing in the case to show that his presence there should have been anticipated, or that it was a place at which the servants of the company should have been on the lookout for persons. The appellee was in the discharge of his duties in going from the inspection of the train to the tool house, and was at a place where the presence of persons on the track might be anticipated. While he was not at work on the track, he was at work for defendant, and was lawfully on the track in the course of his employment, and is as much within the principle of the rule as if laboring on the track. Whether he was guilty of contributory negligence was a question for the jury, and it was also properly submitted to the jury whether, notwithstanding his negligence, those in charge of the train, after they perceived his danger, or should have perceived it by the exercise of ordinary care, might not have avoided the injury to him. This qualification of the instructions is also assailed earnestly by counsel, but it was approved by this court in numerous cases, and is no longer open to question. *Railroad Co. v. McCoy*, 81 Ky. 411; *Railroad Co. v. Earl's Adm'r*, 94 Ky. 374, 22 S. W. 607; *Railroad Co. v. Krey*, 29 S. W. 869; *Crowley v. Railroad Co.*, 55 S. W. 434; *Gunn v. Felton*, 57 S. W. 15; *Flynn v. Railway Co.*, 62 S. W. 490. See, also, to same effect, 1 *Shear. & R. Neg.* § 99, and cases cited.

It is further urged that appellee and the men in charge of the engine were fellow servants, being all engaged in the operations of the yard; and that, at any rate, appellant is not

liable except for the gross negligence of its man in charge of the engine. The engine was run from the coal bin to the side track by a man employed for that purpose to take charge of engines in the yard, and known as the "hostler." There is much conflict in the authorities as to who are fellow servants, but the rule in this state has been steadily maintained from the beginning. In *Railroad Co. v. Collins*, 63 Ky. 114, 87 Am. Dec. 486,—the first case on the subject,—where a laborer on an engine in the yard was injured by the negligence of the man in charge of the engine, this court said: "The only consistent or maintainable principle of the corporation's responsibility is that of agency. 'Qui facit per alium facit per se.' It is therefore responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employees, associated with the engineer in the conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental but independent service, no one of them, as between himself and his co-equals, is the corporation's agent; and therefore it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it." This case, and a number of others following it, were reviewed and approved in *Railroad Co. v. Cavens' Adm'r*, 72 Ky. 559, and still later in *Greer v. Railroad Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345, and *Railroad Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75. In the last case the conductor of a train was injured by the negligence of a car inspector, and it was insisted that the jury should have been instructed that they were fellow servants, or that the company was at least liable only for the gross negligence of the car inspector. The court held otherwise, and said: "In the first place, the person employed at Mound Station to inspect each car of a train, and ascertain if it is in a safe condition, was not a fellow servant of plaintiff in the sense of being upon a common footing and agents of each other. They acted in different spheres, and neither could or was required to know whether the other was properly doing his duty. In the second place, it would have been improper to require the jury to believe the inspector was guilty of gross negligence. The simple inquiry was, as they had been instructed, whether the company, through its inspector, used ordinary care in examining the cars, so as to ascertain whether the ladders attached to each were

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in a safe condition; for it was the legal duty of the company to guard against every source of danger they could, by the exercise of that kind and degree of care, foresee and prevent; and, while a railroad company cannot be required to insure the safety of a train, it is bound to make a reasonable, proper, and careful examination of each car." In *Railroad Co. v. Davis*, 14 Ky. Law Rep. 716, a switch engineer in a railroad yard was held not to be a fellow servant of a switchman and coupler in the yard. In *Railroad Co. v. Moore*, 83 Ky. 675, a fireman, while acting as engineer, was held to be engineer for the time, and not to be a fellow servant of the brakeman. The same rule has been applied as between the crews of different trains, and it seems to us to be a very unsubstantial distinction between the engineer who runs an engine in a yard and one who runs it at other stations along the road, as the fireman usually does in switching. Appellee had no control of the engineer in charge of this engine. He had nothing to do with the running of the trains or the running operations of the road. He was engaged in a distinct department, his only duty being to inspect cars.

Lastly, it is insisted that the verdict is excessive. Appellee is 34 years of age; was earning \$1 a day. He had lost one arm, and does not appear to have received other permanent injury. In no case before this court has it ever sustained so large a verdict for such an injury, and we are all of opinion that the verdict is excessive, and for this reason a new trial should be granted. We see no other error in the record.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

BURNAM, DU RELLE, and O'REAR, JJ., dissent from so much of this opinion as holds that a peremptory instruction should not have been given.

MORBEY v. CHICAGO N. W. RY. CO.

(*Supreme Court of Iowa, Feb. 13, 1902.*)

[89 N. W. Rep. 105.]

Injury to Employee Working under Engine—Contributory Negligence, and Negligence after Discovering His Peril.

Plaintiff's intestate was killed, while working under an engine as a clinker puller, by another engine being run against the one under which he was working, pushing it over him. He was known to be under the engine by another employee, who was on the moving engine. The court charged that, though the defendant may have been negligent at the time of the injury, yet if the deceased, by his own negligence, directly contributed to bring on himself the injury which resulted in his death, plaintiff could not recover unless the jury found that defendant knew he was negligent and in danger long enough before the accident so that it could, by the exercise of reasonable and ordinary care, have prevented the accident as "hereinafter explained": *held*, that such instruction was proper, when considered with the further instructions referred to,

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which showed that no greater knowledge was intended than knowledge of deceased's peril.

Presumption of Care on Part of Deceased.*

Where plaintiff's intestate was killed, while working under an engine, by another engine being run against it and pushing it over him, and there was no direct evidence as to what he was doing at the time of the accident, or how he came to receive the injuries, an instruction that the jury should consider "the instincts which naturally lead men to avoid injury and preserve their own lives, and the presumption that they will ordinarily do so," was not error.

Employee Killed While Working under Engine—Incompetent Employee in Charge of Another Engine—Assumption of Risk.†

Where plaintiff's intestate was killed, while working under an engine, by another engine being run against it by an incompetent man, who was practicing, though deceased knew of a custom to practice with engines, he would not be assumed to know that incompetent men would be permitted to do so, or to have assumed the risk of a peril which he did not appreciate.

Same—Negligence—Question for Jury.

Where plaintiff's intestate was killed, while working under an engine, by another engine being run against it, the question whether another employee, who was on such other engine, could have warned deceased in time to have avoided the injury, was for the jury.

Special Findings.

Code, § 3726, provides that: "A special verdict is one in which the jury finds facts only. It must present the ultimate facts as established by the evidence, so that nothing remains to the court but to draw from them its conclusions of law." Section 3727 provides that in any case where a verdict is rendered the jury may be required to find specially on any particular question of fact. Section 3728 provides that when the special finding is inconsistent with the general verdict, the former controls: *held* that, though the special findings need not cover all the ultimate facts, they should be only of ultimate facts essential to the decision of the case.

Special Verdict—Question Not Warranted by Evidence.

Plaintiff's intestate, M., was killed, while working as a clinker puller under an engine, by its being run into by another engine operated by G., another clinker puller. Defendant requested that the following question be submitted to the jury: "At and prior to the time of M.'s death was it the habit and custom of clinker pullers by themselves to move engines on the house track?" *Held*, that it was properly refused, because limited to the home track, while there was evidence of this habit of moving engines elsewhere.

Special Verdict—Question Not Touching Any Issue.

The question, "If you find for the plaintiff, state upon what negligence you base such finding, and what employee or employees committed it," was properly refused, because it could have been answered without touching any issue in the case.

Same—Question Calculated to Confuse Jury.

The question, "Was R. [an engineer's helper, who was on board the moving engine] guilty of any negligence which contributed to the death of M., and, if so, in what respect?" was properly refused, because the jury might experience much difficulty in putting in form the proper answer, the evidence being such that several different answers might have been given, and for other reasons.

*As to whether there is presumption of due care on the part of deceased, see *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788, and note, 800; 15 Cent. Dig., col. 2592 et seq.; 3 Rap. & Mack's Dig. 850 et seq.

†See generally, 20 Am. & Eng. Enc. Law (2d Ed.) 109 et seq.; 5 Rap. & Mack's Dig. 126 et seq.

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Employee Killed While Working under Engine—Care Required of Employee on Other Engine after Discovering Deceased's Peril.

The question, "Did R. do the best he could, under the circumstances, to prevent the collision, after he knew it was G. who was running the engine?" called for the best R. was capable of, while all that would be required was that which a man of ordinary prudence would have exercised; and hence was properly refused.

Appeal from district court, Clinton county; James W. Bollinger, Judge.

Judgment for damages, from which defendant appeals. Affirmed.

Hubbard, Dawley & Wheeler, for appellant.

Calvin H. George, Chas. A. Clark & Son, and W. G. Clark, for appellee.

LADD, C. J. The facts are fully stated in the opinion delivered by Robinson, J., on the former appeal. *Morbey v. Railway Co.*, 105 Iowa, 46, 74 N. W. 751. Several of the points now discussed were there disposed of. Substantially the same evidence was before the court at that time, and the issues with respect to McGovern's authority to operate the engine as he did, Rahm's neglect in not stopping it in time to avoid the injury, and Morbey's contributory negligence were held to have been rightly submitted to the jury. Upon re-examination of the record, we are not inclined to change the conclusion then reached.

2. The defendant excepted the portion of the tenth paragraph of the charge set out: "It follows from this that, although the defendant may have been negligent at the time of the injury, yet, if the plaintiff's intestate, by his own negligence, directly contributed to bring upon himself the injuries that resulted in his death, his administratrix, the plaintiff in this case, cannot recover, unless you find that the defendant knew he was negligent and in danger long enough before the accident so that it (the defendant) could, by the exercise of reasonable and ordinary care, have prevented the accident, as hereinafter explained." It is said there was no evidence that Rahm knew Morbey was negligent. But it is undisputed that Rahm had left engine No. 383, under which Morby was working as clinker puller, shortly before he got on the other engine, handled by McGovern. There is no evidence as to whether he observed the situation of Morbey, or that the wheels were not blocked as required; and it may be that Rahm's knowledge of any negligence on Morbey's part, if any there was, cannot be inferred. But subsequent instructions are referred to for explanation, and when these are examined it clearly appears that no more was intended than knowledge of Morbey's peril. If Rahm knew Morbey was under 383, in a shallow pit, for the purpose of cleaning out the fire pan, and in that situation was exposed to great danger, and, notwithstanding this, negligently permitted 355 to run him down, the fact of deceased's previous negligence would furnish no excuse. In

other words, it was not essential that Rahm comprehend the character of Morbey's acts. It is sufficient that he appreciated his great peril, or should have done so. If he did, and, by the exercise of ordinary care, could have avoided the accident notwithstanding the previous negligence of the deceased, liability follows. This rule seems to be in accord with the rule as stated by the text writers. See 1 Bailey, Pers. Inj. § 1177 et seq.; Shear. & R. Neg. (5th Ed.) § 99 et seq.; Beems v. Railway Co., 67 Iowa, 442, 25 N. W. 693; Wooster v. Railway Co., 74 Iowa, 596, 38 N. W. 425. It would be monstrous to shield a party from liability for negligence to one in a known position of peril, regardless of his conduct, and yet permit a recovery when known to be negligent in that position. Appellant also insisted that the court erred in instructing the jury to consider "the instincts which naturally lead men to avoid injury and preserve their own lives, and the presumption that they will ordinarily do so." As there was no direct evidence of what Morbey was doing at the time of the accident, or how he came to receive his injuries, the giving of this instruction is in accordance with the rule laid down in Bell v. Incorporated Town of Clarion (Iowa) 84 N. W. 962.

3. Appellant also urges that the evidence conclusively shows that Morbey knew that other clinker pullers were in the habit of operating engines as did McGovern, and hence that he assumed the risk involved, and that the instructions requested to that effect should have been given. In another portion of their brief counsel concluded, after an exhaustive review of the evidence, that they "do not believe a scintilla of evidence can be found in the record to show that any one aside from McGovern ever knew or heard of any employee running these engines around for practice." It would seem that this furnished a sufficient answer. But, even if he had such knowledge, in the absence of information to the contrary he cannot be assumed to have known that those wholly incompetent to manage an engine would be permitted to do so, and the court rightly instructed that he must be found also to have appreciated the peril before being held to have assumed the risk. Whether Rahm could have warned Morbey in time to enable him to escape, we think a question for the jury. While the latter may have had the right to assume the engine under which he was at work would not be disturbed, yet several sharp whistles from another engine near by on the same track, if given shortly after Rahm got on, might have attracted his attention. Of course, much depends upon when Rahm became aware of the situation, and was called upon to act, and the probability of Morbey hearing and giving heed. These were appropriate matters for the jury's consideration and determination.

5. The defendant presented the 13 special interrogatories with the request that they be submitted to the jury, 4 of which we set out: "(1) At and prior to the time of Morbey's death, was it the habit and custom of clinker pullers by themselves

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to move engines on the house track?" "(11) If you find for the plaintiff, state upon what negligence you base such finding, and what employee or employees committed it. (12) Was Frank Rahm guilty of any negligence which contributed to the death of Morbey, and, if so, in what respect? (13) Did Rahm do the best he could, under the circumstances, to prevent the collision, after he knew it was McGovern who was running the engine?" There can be no doubt of the propriety of refusing all of the interrogatories save these. With respect to the first, it will be observed that it is limited to movements on the house track. Under the evidence the jury may have found clinker pullers were in the habit of moving engines elsewhere. The eleventh could have been answered, without touching any issue in the case, by saying the deceased lost his life through the negligence of McGovern. The twelfth is open to several objections, only one of which need be mentioned. The jurors might well be expected to experience much difficulty in putting in proper form the answers to such interrogatories. One answer might have been that Rahm failed to throw the lever as soon as he should; another that he ought to have forcibly removed McGovern when he clung to the lever,—both of which are included in the alleged failure to stop the engine as soon as he ought; another that he should have sounded an alarm in time to have warned Morbey of his danger. Interrogatories, as has often been said, should, whenever possible, be so framed as to call for categorical answers. Had defendant desired an expression as to whether Rahm was negligent in failing to stop the engine as soon as he should, in the exercise of ordinary diligence, or in omitting to sound a warning, these questions might have been propounded in such simple and direct form as to exact the answers of either "yes" or "no." We do not think the court erred in refusing the interrogatory in the form requested. The thirteenth interrogatory was defective in not stating the measure of care required of Rahm. Not the best of which he was capable, but that which a man of ordinary prudence would have exercised if in his situation is all that is exacted.

Affirmed.

GALVESTON, H. & S. A. RY. CO. v. RUBIO.

(*Court of Civil Appeals of Texas, Dec. 18, 1901.*)

[65 S. W. Rep. 1126.]

Injuries to Sick Employee Resulting from Refusal to Transport Home— Breach of Contract to Furnish Medical Attention—Remote Dam- ages.*

Where plaintiff sought to recover damages for breach of defendant's contract to furnish him medical attention, damages suffered by reason of plaintiff being compelled to walk from the place where he was taken

*As to whether remote damages for personal injuries may be recovered, see 3 Rap. & Mack's Dig. 673 et seq.; 8 Am. & Eng. Enc. Law (2d Ed.) 596 et seq.; 15 Cent. Dig., col. 1678 et seq.

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sick to his home, by reason of his lack of funds to pay railroad fare, and defendant's refusal to transport him, was not recoverable, being too remote.

Same—Same—Damages—Mental and Physical Suffering.*

In an action for breach of contract to furnish a railroad employee medical and hospital attention, plaintiff is entitled to recover for both physical and mental suffering.

Appeal from El Paso county court; Jas. R. Harper, Judge.

Action by Ramon Rubio against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Beall & Kemp, for appellant.

W. M. Coldwell and R. F. Burgess, for appellee.

JAMES, C. J. Appellee sued, alleging that in El Paso county he was employed by appellant to work as a laborer on its line of railway, agreeing to pay him \$1.25 per day, and, in the event of plaintiff becoming sick, to furnish him with all necessary hospital and medical attention and medicines, and to send plaintiff to a hospital for such purposes, and to defray the expense thereof the sum of 50 cents monthly was to be deducted by defendant from plaintiff's wages, and after plaintiff had been in defendant's employ three months defendant agreed to transport him back to El Paso without cost to plaintiff. The petition alleged that defendant set him to work at Schulenburg, a malarial locality, which fact was known to defendant, and unknown to plaintiff; that he began work about September 12, 1900, and about September 22d plaintiff contracted malarial fever, commonly known as "chills and fever," of a violent nature; that he repeatedly applied for the necessary medical, hospital, and other attention provided for in the contract, which was refused him, although the 50 cents therefor was deducted from his pay; that plaintiff had no money and no friends nearer than El Paso county, Tex., and no means of providing food, shelter, or medical attention, all of which was well known to the defendant at the time it so refused; that the weather was bad; that by reason of defendant's refusal aforesaid the malady of plaintiff was greatly aggravated, and he was left sick and helpless among strangers, 700 miles from home; that having no money, nor any means of procuring any money, or a ticket, he was compelled to make his way back to his home in Socorro on foot, and suffered great bodily and mental pain and anguish, and was permanently injured in his bodily constitution and health, and was totally incapacitated from labor from that time to the filing of his petition, and his capacity to labor and earn a living has been permanently impaired, all of which defendant knew would be the result when it refused to comply with its

*As to the right to recover damages for mental suffering, see *Texarkana, etc., Ry. Co. v. Anderson* (Ark.), 18 Am. & Eng. R. Cas., N. S., 37, and note, 44 et seq.

said contract, all to plaintiff's damage in the sum of \$950. The jury gave plaintiff a verdict for \$200.

We deem it unnecessary to discuss all the assignments. Except in respect to the matter for which the judgment is reversed, we see no error in this record. The charge of the court, supplemented by a requested charge that was given, was, in our opinion, a fair presentation of the issues. The objection we sustain goes to an item which was not proper to consider as damages. According to plaintiff's testimony and that of other witnesses, defendant violated its contract in regard to furnishing plaintiff with necessary medical and hospital assistance. For such breach of contract plaintiff would be entitled to recover to the extent of the damages he may have sustained, which might be expected as naturally resulting from such breach. The act of plaintiff in making his way back to his home in Socorro on foot was his voluntary and independent act. It had no connection with defendant's refusal, as a natural result thereof, nor was it an act to be reasonably expected therefrom. As a matter of damages, it was too remote, and was calculated to affect the verdict. Defendant would be responsible if it violated said provision of its contract to compensate plaintiff in reference to his immediate sickness and the consequences thereof attributable to its failure to give him the necessary attention, and we may say here, in view of the assignments of error, that loss of time, and decreased capacity to earn a living, could not be regarded as too remote.

Defendant, by special demurrer, sought to strike from the petition the allegation "that having no money, nor any means of procuring any money or a ticket, he was compelled to make his way back home in Socorro on foot," because this allegation sets up damages too remote, and is calculated to prejudice the jury. Objection was made to the testimony at the time upon the same grounds. A charge also was requested instructing the jury not to consider such evidence, nor allow plaintiff anything on this issue, as such damages were too indirect and remote. These assignments are well taken.

Appellant attacks the charge, which informed the jury that they might consider (among other things) plaintiff's mental and physical suffering, if any, suffered by him by reason of, or as the immediate result of, such breach of contract; the objection being to this charge embracing mental suffering. Although the damages sought were for breach of contract, it will be observed that the very subject-matter of the contract was the health or physical condition of the employee. From a breach of it physical suffering and injuries would naturally follow. It is the rule, where there is serious physical injury occasioned by the act of another, mental suffering, if any, may also be considered as an element of damages (*Brown v. Sullivan*, 71 Tex. 476, 10 S. W. 288), and, without discussing the evidence, we are of opinion that the rule has application in this case. Reversed and remanded.

LINDSAY v. NEW YORK, N. H. & H. R. Co.*(Circuit Court of Appeals, Second Circuit, December 6, 1901.)*

[112 Fed. Rep. 384.]

Railroads—Employees—Obvious Danger—Assumption of Risk.*

Where a brakeman who had been continuously employed in a railroad yard for over nine months was injured by falling into a drain, which, with 118 other similar drains, had plainly existed in the yard during all the time of his employment in substantially the same condition, he should be presumed to know of the existence of such drains, and to have assumed the risk thereof.

Same—Question of Law—Jury.

Where a certain risk of an employment is plainly observable to an employee, and he continues to work where such risk is constantly encountered, he assumes the risk, as a matter of law, and the question is not for the jury.

In Error to the Circuit Court of the United States for the Eastern District of New York.

Sumner B. Styles, for plaintiff in error.

Henry N. Taft, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge. The claim of the plaintiff is, in substance, that while discharging his duty as a brakeman (or pinpuller) in one of the yards of the defendant, at about 2 a. m. July 9, 1899, he stepped or slipped into a sluiceway or drain that ran under and across the tracks of the defendant railroad, which was open and uncovered at that point where the plaintiff slipped and fell into the same, and that it was directly in the path of the plaintiff in the discharge of his duty as such brakeman, and by reason of his fall he was run over by the cars he was about to couple and severely injured. He testified that he was employed in this yard continuously since September of the year before. It will be perceived that, if upon the facts of the case it appears that the risk he encountered to his hurt that night was a risk which it must be held he assumed when entering into or continuing in the employ of defendant, there will be no necessity to examine into the other questions, which have been argued here at length, viz. whether defendant was negligent, and whether plaintiff's negligence contributed. For the present, therefore, it may be assumed that the place where he was set to work was not reasonably safe, and that he acted on the night in question with reasonable prudence under all the circumstances.

The rule of law governing assumption of risk is familiar. The employee has the right to assume that the employer will use reasonable care to secure him a safe place to work in. He

*See generally, 20 Am. & Eng. Enc. Law (2d Ed.) 114 et seq.; 5 Rap. & Mack's Dig. 141 et seq.

may rely on this assumption, subject, however, to the exception that, where there exists a defect known to him, or plainly observable by him, he cannot recover for an injury caused by such defect if he continues to work where it exists. *Railway Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. Where there is reasonable ground for difference of opinion as to whether the defect was "plainly observable by him," the jury should decide; but when it is plainly thus observable the court will dispose of the case by direction of a verdict. Citations of opinions in other cases are not especially helpful, since the decision of each case necessarily depends on its own facts, and these are rarely the same in any two cases. Plaintiff's hours of work were from 11 p. m. to 7 a. m. He was generally working all the time, as it was a busy yard, and there was a great deal of switching done there. He was continuously employed from September till July 9th. It was part of his duty to run along the path between the tracks beside or ahead of moving cars, and he was continually crossing the drains which intersected the tracks. He testified that there were no lights for the purpose of lighting the yard, and that the lantern carried at night threw but very little light on the roadbed; and that, although he knew there were drains there, he did not know where they were, nor had he ever noticed that they projected beyond the ties. The drains were made of wood, and were about the same color as the ties. They were made of 2-inch planks, and were 10x10 inches on the inside, and extended beyond the ties at the top from 3 to 5 inches, and then the ends sloped down to the bottom of the drains, so that the bottom of the drain extended beyond the ties into the space between the tracks from 10 to 12 inches. The system of drainage, which was there when plaintiff came to the yard, was uniform. All the sluiceways or drain boxes were similarly constructed. There were 119 sluiceways or separate drain boxes, and double that number of openings in the yard, 28 of them near the place where the plaintiff was injured. Such substantial structures as these, projecting several inches into the pathway between the tracks along which plaintiff was continually moving, would seem to be "plainly observable"; and the photographs, which were in evidence and whose accuracy is not disputed, show that there was nothing latent about the risk they introduced. If the plaintiff's sole opportunity of observation had been in the obscurity of night, he might have worked there a long time without observing them. But when it appears that during the months of April, May, and June, and the first week in July, he was moving back and forth over these open and projecting drains every day from daybreak until 7 a. m., he must be held chargeable with knowledge of their existence, and of whatever risk to one using the pathway their appearance would indicate even to the casual observer.

The judgment is affirmed.

SAMPLE v. CONSOLIDATED LIGHT & RY. CO.*(Supreme Court of Appeals of West Virginia, Dec. 14, 1901.)*

[40 S. E. Rep. 597.]

Accident on Track—Declarations of Motorman as Res Gestæ.

A declaration by the motorman running on an electric car, made while the car was still on the body of one it had run down, that "I saw the child, but thought I could pass it;" or, "This is a terrible thing, I saw the child, but thought I could run past it,"—is admissible in evidence as a part of the res gestæ in an action for the injury.

Same—Care Required of Motorman in Looking Out for Children.*

A motorman in charge of an electric car moving in the public street, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of the car.

(Syllabus by the Court.)

Error to circuit court, Cabell county; E. S. Doolittle, Judge.

Action by E. E. Sample, administrator, against the Consolidated Light & Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Campbell, Holt & Campbell, for plaintiff in error.

Rankin, Wiley, Peyton & Perkinson, for defendant in error.

McWHORTER, J. The defendant offered the following instruction: "The court also instructs the jury that in considering this case they must wholly disregard the evidence of Mrs. Caverlee so far as the same relates to the following statement which she attributed to Motorman Wade, 'I saw the child, but thought I could pass it.' Also wholly disregard the evidence of witness E. McClain as it relates to statement attributed by him to Motorman Wade, to wit: 'This is a terrible thing. I saw the child, but thought I could run past it,'"—set out in bill of exceptions No. 2. The defendant also filed bills of exceptions to the rulings of the court in permitting the plaintiff to ask the witnesses Mrs. Caverlee and E. McClain the questions eliciting the answers set out in the instruction to be asked and answered. The question is, can the statement attributed to the motorman at the time and under the circumstances of the accident be treated as a part of the res gestæ? It is contended by plaintiff in error that it is not bound by the expressions of the motorman as stated by the witnesses, even if true; that the statements were simply the narrative of the past event, and not concurrent with the fact involved, and therefore could not be treated as part of the res gestæ and could not have been admitted on any other ground. In 2 Jones, Ev. § 347, it is stated: "When declarations or acts accompany the facts in controversy, and tend to illustrate or explain, they are treated, not as hearsay, but as original, evidence; in other words, as part of the res gestæ. Thus conversations contemporaneous with the facts in controversy, and explaining such facts, are admissible." And authorities there

*See notes at end of case.

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cited. The rule is laid down in 21 Am. & Eng. Enc. Law, 99, as follows: "The rule is that evidence of words or acts may be admissible (notwithstanding the general rule against derivative evidence) on the ground that they form part of the *res gestæ*, provided that the act which they accompany is itself admissible in evidence, and that they reflect light on or qualify that act. But they must be so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction. If declarations are made some time before the act, and stand alone by themselves, they are not within the rule, and are inadmissible. If they amount to no more than a mere narrative of a past occurrence, or of an isolated conversation held or an isolated act done at a latter period, they are not admissible; but, if declarations of a past occurrence are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*." 1 Whart. Ev. § 259, states the rule substantially the same way. 1 Greenl. Ev. 162g, says: "The willingness to receive these statements as an exception to the hearsay rule rests on the notion that the circumstances of the occasion so excite and control the mind of the speaker that his statements are natural and spontaneous, and therefore sincere and trustworthy;" and quotes *U. S. v. King* (C. C.) 34 Fed. 314, where the court charged the jury that: "The declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have." And in 14 Am. & Eng. Enc. Law, 914, it is said that, "while it is essential that the declaration should be contemporaneous with, or at least so connected with, the main fact in issue as to constitute a part of the transaction, and thus derived clearly from the main fact or act itself, still it is not necessary that a declaration, to be part of the *res gestæ*, should be precisely and astronomically contemporaneous and concurrent in point of time with the principal transaction, but rather that it be made voluntarily, unpremeditatedly, spontaneously, and under the immediate and unconscious influence of the principal transaction, and be made at such a time, whether contemporaneous and concurrent or not, and under such circumstances and conditions, as to preclude the idea of deliberate intent and design." Underh. Ev. § 57, says: "Though the majority of the American decisions, however, do not require that the act and the declarations should be precisely contemporaneous, provided they are

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otherwise connected, in many of the states the strict English doctrine is adhered to. Their unpremeditated and spontaneous character being the main ground for their reception, it is clear, on the whole, that, where any interval has elapsed between the act and the declaration, the likelihood that the declarant has taken advice, or considered what he should say, would have a bearing on their exclusion. * * * But when the declaration was made soon after the event with which it was connected, it is admissible, provided a period, however short, has not elapsed which would give an opportunity for a deliberation." In *Railway Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034, it is held: "A declaration by the motorman running an electric car, made while the car was still on the body of one it had run down, that the reason he did not stop was that he could not reverse the car, is admissible in evidence as part of the *res gestæ* in a suit for the injury." Carrying Co. *v.* Gnuse, 137 Ill. 264, 27 N. E. 190; *Railway Co. v. Allen*, 54 Ill. App. 27; *Shafer v. Lacock*, 168 Pa. 497, 32 Atl. 44, 29 L. R. A. 254; *Nugent v. Breuchard* (Sup.) 36 N. Y. Supp. 102; *Robinson v. Railway Co. (Wis.)* 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897; *Railroad Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167; *Railroad Co. v. Norris*, Id. 708; *Railroad Co. v. Weaver*, Id. 846; *Railroad Co. v. Jones* (Miss.) 19 South. 91; *Wilson v. Southern Pac. Co. (Utah)* 44 Pac. 1042, 57 Am. St. Rep. 766; *Railroad Co. v. Baier* (Neb.) 55 N. W. 913; *Hanna v. Hanna* (Tex. Civ. App.) 21 S. W. 720; *Railroad Co. v. Lyons* (Pa.) 18 Atl. 759, 15 Am. St. Rep. 701; *Livingstone's Case*, 14 Grat. 592; *Kirby's Case*, 77 Va. 681, 46 Am. Rep. 747.

Plaintiff in error relies upon *Corder v. Talbott*, 14 W. Va. 277 (Syl., point 3), where it is held: "When the declarations are merely a narrative of a past occurrence, though made ever so soon after the occurrence, they ought not to be received in evidence, they being in such case no part of the *res gestæ*." In that case Judge Green shows that the declaration there sought to be given in evidence was a declaration of the party in his own favor, and, as the judge says: "In the case before us we have seen there is no difficulty in saying that the fact, in connection with which the defendant's declarations were proposed to be admitted, was in no manner connected with the material fact at issue in the case; that is, whether the defendant had signed the bond. The defendant's declaration that he would not sign it is in no manner connected with the material fact at issue. It is a circumstance, as we have seen, in itself so unconnected, that it would not have been given in evidence as direct evidence on the trial of this issue; and it was only admissible as a collateral fact to contradict one of the plaintiff's witnesses. And therefore, they, being declarations of a party in his own favor, though a part of the *res gestæ*, of a collateral fact introduced into the case merely to contradict a witness of the other side, but in no way other-

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wise connected with the material fact or inquiry involved in the issue, were not admissible." And further he says: "These cases are readily distinguishable from the ordinary case of a prisoner declaring immediately after the killing of a man how he committed the act. In such a case a material part of the inquiry is, what were the prisoner's motives or feelings? And his declarations immediately afterwards tend to show these feelings, and for this reason they are admitted. They are, in such case, not a mere recital of a past occurrence. The act here was the refusal by the defendant to sign this bond. Such an act, in its very nature, cannot be illustrated, explained, or characterized by any declarations of the defendant." The case of *Luby v. Railroad Co.*, 17 N. Y. 131, is cited by plaintiff in error, and he quotes from the language of the court: "It [declaration] was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete when he made the statement, and the driver was only endeavoring to account for what he had done." But he fails to quote the next sentence, which is, "He was manifestly excusing himself, and throwing the blame on his principals;" thus clearly showing that the court excluded it because the driver had had time to fix up a story to clear himself of blame and cast it upon his principals. It was not a declaration made, as in case at bar, which is clearly brought within the rule as laid down in the authorities cited as being a "spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design." The very nature of the declaration alleged to have been made by the motorman in the case at bar shows, if made, that it was true, because it was against himself, and, if uttered at all, must have been without thought or premeditation, and it was so soon after the accident (if it can be said at all to be after the accident) that he had not time to think what would be the effect of his expression. It was uttered while the thought was still fresh in his mind. "He thought he could run past it," but now finds that he was mistaken.

Plaintiff in error also cites *Hawker v. Railroad Co.*, 15 W. Va. 628, 36 Am. Rep. 825, to show the approval by Judge Green of the said case of *Luby v. Railroad Co.*, cited. We find in the same case, on page 638, 15 W. Va., 36 Am. Rep. 825, where Judge Green cites with approval the case of *Railroad Co. v. Coyle*, 55 Pa. 402, where a peddler's cart had been overthrown by a railroad car, and a suit instituted by him for the injury. The plaintiff was permitted by the court below to prove the declaration of the engineer at the time of the accident for the purpose of showing the train was behind time, and thus show carelessness and negligence as a part of the *res gestæ*. Judge Green says: "The supreme court say: 'The record shows no bill of exceptions to this evidence; but, if it did, we cannot say that the declaration of the engineer

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was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declaration, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself.' ' This was a case in which the declarations of the engineer were made after the accident was complete, "in view of the goods strewn along the road by the breaking up of the boxes, and it seems to have grown directly out of and immediately after the happening of the fact," and, as it was against the engineer himself, showing his own negligence, the court admitted it in evidence against the company as a part of the transaction itself. It would be hard to conceive of a case more perfectly illustrating the facts and circumstances of the case at bar. The declarations of the motorman, if made, were made immediately after the happening of the accident, and while the child was yet under the car, mangled and crushed to death; the motorman, up to that time, not having sufficiently recovered himself to fabricate a story which would exonerate him from blame, and under the first impulse, feeling that the facts were patent to every one, only stated what is almost certainly the truth, and which is the most plausible explanation of the transaction that could have been made. If he had seen that child starting from the curbstone to run towards the track as soon as others saw it, and as it was his duty to see it, he would undoubtedly have at once applied the forces for stopping the car, and must have succeeded before striking the child, because he admits in his testimony that it was half way from the curb to the track when he discovered it and began to stop the car, and even at that late time he was within a few feet of stopping it before the collision occurred. Plaintiff in error cites two Massachusetts cases,—*Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 282, and *Williamson v. Railroad Co.*, 144 Mass. 148, 10 N. E. 790,—which come more nearly supporting his contention than any other cases he cites, but the great preponderance of authorities is against him. He referred to the case of *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299, and quotes very largely from the opinion in that case written by Justice Harlan. It is there held: "The declaration of the engineer of the locomotive of a train, which meets with an accident, as to the speed at which the train was running when the accident happened, made between ten and thirty minutes after the accident occurred, is not admissible in evidence against the company in an action by a passenger on the train to recover damages for injuries caused by the accident." It will be observed that these declarations excluded were made some time—from ten to thirty minutes—after the accident occurred,

and even in that case Justice Field wrote a dissenting opinion, in which Chief Justice Waite, Justice Miller, and Justice Blatchford concurred, in which dissenting opinion they refer with approval to the case of *Railroad Co. v. Coyle*, supra. This opinion was rendered in 1886. In 1897 Justice Harlan wrote the opinion in the case of *Pierce v. Van Dusen*, 24 C. C. A. 280, 78 Fed. 693, in which it is held: "Where a railroad employee has been injured by the movement of cars about which he was at work, statements of the conductor of the train, made almost immediately, and while the cars were moving, or had just stopped, and while the injured man was bleeding from the injury at that moment received, describing his own part in bringing about the motion that effected the injury, are admissible, on the trial of an action for such injury, as part of the *res gestæ*."

It is seen there can be no fixed inflexible rule as to what declarations and assertions are a part of the *res gestæ* in every transaction, but the facts and circumstances must to a large extent control in each individual case. While the evidence to prove or tending to prove the declarations of the motorman as part of the *res gestæ* was clearly admissible under the circumstances of this case, the evidence is sufficient to sustain the verdict without it. The motorman saw the child, and vainly thought he could run past the point where the child would reach the track before it reached it, or he failed to see it in time to save it. If he had seen it from the moment it left the curbstone as it was seen by witness Clyde Tanner, who was riding on his bicycle behind the car, as was his duty to see it, he would have had good time to have stopped the car, and would have done so; but the child had run half the distance, according to the motorman's own testimony, before he saw it, and the fact that he at that late time only lacked a few feet of having the car stopped in time to have prevented the collision makes it clear that if he had seen it when he should have seen it—i. e., when it started from the curbstone—he would have had ample time to have stopped the car before the accident. One of a motorman's highest duties is to keep a proper lookout for persons, and especially for children, on and about the track. *Gunn v. Railroad Co.*, 42 W. Va. 676, 680, 681, 26 S. E. 546, 36 L. R. A. 575, of which case, Syl., point 3, is as follows: "The engineer and fireman of a railroad train must keep a careful lookout on the track ahead to discover persons and animals upon it, and use ordinary care to avoid injury to them." This applies to railroad moving trains through the country. The required care is certainly no less in moving an electric car on the streets of a populous city, when children may be expected to be playing on the streets. *Railroad Co. v. Ormsby*, 27 Grat. 455: "A railroad company running its cars through a populous street of a city on which many children live must omit nothing which can be done by the company and its agents to prevent injury

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to children on the street." And it is there further held (Syl., point 3) that "a child two years and ten months old cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence." In *Felton v. Newport*, 44 C. C. A. 530, 105 Fed. 332 (Syl., point 3), it is held: "The mere fact that a lookout was maintained on an engine, as required by statute, and that he did not see a person on the track, does not exonerate the railroad company from liability for the killing of such person, but it must further appear that the lookout could not have seen him in the exercise of due care and watchfulness." The question in case at bar is, how is it possible for the motorman not to have seen the child until it was halfway across the street towards the track? and yet he says he did not sooner see it.

I see no error in the judgment, and the same is affirmed.

NOTES.

CARE REQUIRED OF THOSE IN CHARGE OF STREET CARS TO PREVENT INJURIES TO CHILDREN.

General Statements of Rule.

It will be found from an examination of the authorities that, as a general rule, those in charge of street cars are required to exercise ordinary care to avoid injuring children; but what is ordinary care in this respect depends upon circumstances.

An electric street-railway company should so operate its line as to protect the lives of children and others who have a right to use the street, and it is guilty of negligence if it fails to exercise ordinary care for the protection of children if their parents or guardians have done nothing to unnecessarily expose them to danger. *Riley v. Salt Lake R. T. Co. (Utah)*, 37 Pac. Rep. 681.

Although the parents of a child of tender years may be negligent in allowing it to be at large upon the public streets, yet a street-railway company is liable for its death, if the death might have been avoided by the exercise of ordinary care on the part of its driver. *Czewezka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911.

But a street-railway company does not fulfill the measure of its duty to a child of tender years near its track by simply warning it to keep off. *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120.

And when persons in charge of an electric street-railway car see a child of tender years on the tracks at a crossing which the car is approaching, they have no right to presume that the child will leave the track, but on seeing the danger must use all possible diligence to avoid injury. *Wallace v. City & Suburban R. Co. (Ore.)*, 37 Pac. Rep. 477.

Persons in charge of a street car on becoming aware that a young child is approaching the track with the apparent intention of crossing in front of the car, or upon discovering it upon the track, are charged with a higher degree of care than when aware of the presence of an adult under the same circumstances. *San Antonio St. R. Co. v. Mechler (Tex.)*, 30 S. W. 899.

But street-car companies are not liable for accidental injuries to children by running cars over them. In order to recover there must be proof of negligence on the part of the car driver. *Klein v. Crescent City R. Co.*, 23 La. Ann. 729.

Illustrations—Negligence.

If the evidence shows that the boy who was run over by the car was physically and mentally able to take care of himself on the

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street, and that he was in the habit of traveling the public streets alone, the driver of the car or the company owning the road will not be permitted to set up in defence to the action for damages that the accident occurred through the negligence or want of consideration in the father in allowing the child to go on the streets alone; nor will the fact that the child failed to get out of the way be allowed to weigh in favor of the company in mitigation of damages, if the evidence shows, as in this case, that the driver was driving the car at the time of the accident at an unusual if not an unlawful rate of speed. But in such case the company will be held liable to the full extent of the damages caused by the injuries which the boy had sustained. *Barksdull v. New Orleans & C. R. Co.*, 23 La. Ann. 180.

Proof of a horse car being driven at a trot over a principal street crossing in a city, past another car from which passengers were alighting, the former car being so driven that, after running over a child, it went the width of the street before stopping, shows negligence. *Reed v. Minneapolis St. R. Co.*, 34 Minn. 557, 27 N. W. 77.

In an action to recover for the death of a child about two years of age it appeared that the motorman of the car which inflicted the injury could see on the track from one block to another, and did see children on the track at or near the place where the injury was inflicted while a block away; that he saw the child injured go away from the track, and when twelve feet therefrom, turn and run "as fast as it could towards the track," showing an intention to cross in front of the car; that the car was running at the rate of six miles an hour and could have been stopped in not exceeding fifteen feet, and that after striking the child it ran at least twenty-seven feet, dragging the child that distance, and it was held, that the negligence of the railroad company was conclusive. *San Antonio St. R. Co. v. Mechler (Tex.)*, 30 S. W. 899.

In an action for the death of a child five years old, by negligence, evidence that the car was running at twice the rate allowed by law, that the driver saw the child thirty-five feet away, and neither slackened speed nor applied the brake, and that if he had applied the brake the car would have stopped before striking the child, is sufficient evidence of negligence. *Huerzeler v. Central, etc., R. Co.*, 1 Misc. (N. Y.) 136.

Plaintiff, a boy of five, started to cross Second avenue, New York City, in charge of another boy about twelve. The older boy just passed in front of the horses of a street car, but plaintiff was struck and injured. It was about noon, and the driver was urging his horses at an unusual rate of speed. It appeared that the boys could have been seen approaching the track when 90 or 100 feet distant, and that the car could have been stopped, when going at a proper speed, in from 16 to 22 feet: *held*, that the case should have been submitted to a jury, and a judgment of nonsuit was error. *Pendril v. Second Ave. R. Co.*, 43 How. Pr. (N. Y.) 599.

Where it appeared that when the street car was fifty feet away and approaching rapidly, the deceased, a girl between nine and ten years of age, stood on the cross walk about two feet from the track with her back toward the car, calling to her companions on the sidewalk to follow; that the speed of the car was not checked, though the driver had a clear view, and that as the girl turned to cross the track she was struck and killed. *Mallard v. Ninth Ave. R. Co.*, 15 Daly (N. Y.) 376.

The horses of a street car became frightened and ran away and injured a boy. It seemed that the car might have been stopped by applying proper brakes, but they had been rendered useless by other boys, out of a spirit of mischievousness, having thrown them out of order; but there was evidence tending to show that this could have been prevented by tying down the brake, which was well known to the officers of the company, and that on other occasions the brake had been tied down: *held*, sufficient negligence to charge the company

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with liability. *Dintruff v. Rochester City & B. R. Co.*, 32 N. Y. S. R. 730, 57 Hun 585, 10 N. Y. Supp. 402.

Absence of Negligence.

In *Citizens' Street R. Co. v. Carey*, 56 Ind. 396, a child two and a half years old stood on the street crossing 3 to 5 feet from the street-railway track. A car drawn by one horse approached at the usual rate of speed of cars in that city. The driver saw the child when 60 feet away. When the head of his horse was from 3 to 5 feet from the crossing, the driver noticed that the child was about to move towards the track, and he tried to stop the car, but could not do so, and the child was run over. The jury returned a verdict for the plaintiff. On appeal the supreme court held the judgment must be set aside, because there was no evidence of the driver's negligence. The court saying: "The duty to the traveling public was to make regular trips, and on time, whenever it could reasonably be done. This necessarily forbade that he should stop his car or slacken its speed except when there was a necessity for it. The running of the street cars, as we have said, conformably to the regulations, was a service useful to the public, and required by implied contract. In our opinion, the facts in this case do not show that a necessity appeared for stopping or slackening the speed of the car till the plaintiff attempted to cross the track; that when that necessity did appear the driver made what effort he could to avert the catastrophe that happened, but that the effort was unavailing, because the necessity was created by the act of the plaintiff when it was too late to avert the unhappy consequences of that act. * * * She stood still beside the track. There she had stood from the moment the driver first saw her, and continued to stand till, it may be said, she, in effect, threw herself under his horse's feet. Nothing indicated to him that she intended to cross the track, but on the contrary, that she was standing there for the purpose, as was the habit of children of the city, to witness the passage of the car. The facts would justify the driver in drawing this conclusion. Everything indicated to him that there was no necessity for stopping the car or slackening its speed. We do not think it is the duty of a street-car driver to stop his car, or to constantly creep along at a snail's pace, for fear or in anticipation that some child may possibly throw itself under his horse, in the absence of anything indicating the probable occurrence of such an act. * * * It seems to us that he was not bound to slacken his speed, it then being but ordinary, till there was a necessity for it. What necessity for it appeared in this case? The plaintiff was standing beside the track, where she was out of danger, and where it was common for children to stand as the cars passed. She evinced no disposition to enter upon the track, or to approach to a dangerous proximity to it. The presumption was that she would not. In such a case, it seems to us clear that it was not negligence in the driver to continue his usual rate of speed till the plaintiff did commence to move upon the track."

In *Funk v. Traction Co.* (Pa. 1896), 34 Atl. 861, where a boy running rapidly from a cross street entered a street on which there was a car line, and attempting to cross it diagonally, suddenly came in contact with a street car and was injured, Green, J., said: "It is not probable that he was on the track in front of the car, as none of the testimony places him there; but, whether he was or not, he could not recover under all our decisions on that subject. The present case is quite similar in its leading facts to *Chilton v. Traction Co.*, 152 Pa. St. 425, 25 Atl. 606. The plaintiff was a child about 5½ years old, who ran suddenly against the side of a passenger railway car, and was injured. Paxson, C. J., delivering the opinion, said: 'We have, then, the case of a boy who unexpectedly and without any warning, runs from the pavement against a moving car passing at the time. The gripman saw the child plainly on the pavement before he put on his grip to go ahead fast. The child turned immediately, and ran out into the street, and, for anything that appears, before the car could be stopped, the accident occurred.' In the case of *Railroad Co.*

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v. Spearen, 47 Pa. St. 300, a child five years of age attempted to cross the track immediately in front of an approaching locomotive, and was injured. We held there was no right of recovery, although there was conflicting proof as to whether the whistle was blown."

Where a street car, with the mules in a walk, approached a number of children who were playing about the track, and they began to throw up their hands and scream in an attempt to frighten the mules, whereupon the driver applied the brakes and pulled on the reins, but one of the children was knocked down by the mules in attempting to cross the track, it was held that the driver was not guilty of negligence. *Dallas City R. Co. v. Beeman*, 74 Tex. 291, 11 S. W. 1102.

An instruction that "all persons have a right to be on and pass along the street, and one is not a trespasser because he happens to be on the line or track of the street car," is improper and misleading where it appeared by the testimony of the plaintiff, a child of eight years of age, that she was playing in the street and ran and stopped to look after another child with whom she was playing just before the injury, and the evidence on behalf of the company was to the effect that the plaintiff unexpectedly jumped in front of the car. *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 12, 37 Pac. 341.

And where a child, injured by an electric car, was seen by the motorman before the accident, but was then standing in the street making no motion to cross the track until the car was within ten feet of her, whereupon the motorman did all he could to prevent the accident, it was held, that the defendant was not liable. *Fleishman v. Neversink Mountain R. Co.*, 174 Pa. St. 510, 34 Atl. 119.

When a child of tender years is killed at a street crossing by an electric car, at a time when school children may be reasonably expected to use the crossing, and it does not appear that the child came so suddenly on the track as to render the killing unavoidable, but that she was on or within three feet of the car, and in plain view for some distance of the person in charge of it, but that no effort was made to slow down, it is for the jury to determine whether or not the killing was the result of the negligent operation of the car. *Wallace v. City & Suburban R. Co. (Ore.)*, 37 Pac. Rep. 477.

If the child runs on the track so suddenly that the driver has no such notice of danger as to give him an opportunity to avoid the injury by the exercise of ordinary care, the child cannot recover of the company. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. 385.

Where a child suddenly comes upon the track immediately in front of the car horses, from behind a wagon that had obstructed the driver's view, and the latter does everything possible to avoid an injury after the child is discovered, there can be no recovery against the company. *Kennedy v. St. Louis R. Co.*, 43 Mo. App. 1.

Where a little child runs against a car and is run over by the hind wheel, after the mule and the front part of the car have passed, it is not negligence in the driver if he did not see it, when he had no reason to expect it would be there. *Gallaher v. Crescent City R. Co.*, 37 La. Ann. 288.

Where a municipal ordinance requires drivers of street cars to keep children off them, a driver is not guilty of such negligence as to make the company liable for injury to a boy two and a half years old who gets immediately in front of the car mule, or between its fore legs, while the driver is at the rear of the car driving boys away, and is injured when the car is started up, it appearing that he could not have been seen by the driver standing in his usual position. *Hearn v. St. Charles St. R. Co.*, 34 La. Ann. 160.

Where the child killed ran in front of the car, and the gripman was free from negligence, there ought to be no recovery. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536.

In an action against a street-railway company to recover damages for the killing of plaintiff's child by defendant's car, the fact

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appeared, by the testimony of plaintiff's witness, to be as follows: The car was moving at a moderate rate of speed on a slightly down grade, and witness was standing beside the driver, when he heard the driver shout, "look out," "hold on," or "stop." Turning, he saw plaintiff's child (a boy three years old) about six feet ahead of the car mules and four feet from the track, and running toward the track. The driver, with his right hand on the brakes and his left pulling on the lines with such force that the tongue went up over the heads of the mules, was doing his best to stop the car. The child ran to the middle of the track, where he was overtaken and crushed by the car. The whole transaction seemed to the witness to have occurred "in a moment." There was no positive proof that the driver saw the boy at all before he hallooed: *held*, that on this state of facts the plaintiff was not entitled to recover. *Maschek v. St. Louis R. Co.*, 2 Am. & Eng. R. Cas. 38, 71 Mo. 276.

A street-car company is not liable for injuries to a child where it is standing near the track when the horses and front part of the car pass, but without anything to indicate danger, and then suddenly approaches and is run over by the hind wheels. *Bulger v. Albany R. Co.*, 42 N. Y. 459.

A child about four years old was injured while playing on a street-car track in the month of January. The car was going at the usual speed, and the accident occurred between street crossings, and the evidence tended to show that the child ran against the car which caused the injury. There was no evidence to show either negligence or incompetency on the part of the driver: *held*, that a nonsuit was properly granted. *Jaquinto v. Broadway & S. A. R. Co.*, 49 N. Y. S. R. 627, 21 N. Y. Supp. 639, 2 Misc. 174.

Where a child eight years old attempted to cross a street where there was no crossing, and passed immediately in the rear of a car going one way and stopped very near the next track, and was immediately struck by one of the horses hauling a car in the opposite direction, there being evidence that the horse striking the child was a little outside of the rail, and that she was struck by some portion of the horse's body between the shoulder and hip, and that the driver pulled the horses in the opposite direction just before the accident, plaintiff contending that this caused the hind portion of the horse to be thrown further out and against the child: *held*, that the company was not liable. *Baker v. Eighth Ave. R. Co.*, 41 N. Y. S. R. 353, 62 Hun 39, 16 N. Y. Supp. 319.

A mother with her child, about eighteen months old, was crossing a street, leading the child, but stopped about two feet from the defendant's street-car track to let a car pass, which was moving very rapidly, though on an up grade, and in some way unexplained the child escaped from her and was injured under the car, but it appeared that the mother was frightened at the rapid approach of the car and was confused: *held*, there was not sufficient evidence of negligence. *Wolf v. Houston, W. S. & P. F. R. Co.*, 19 N. Y. S. R. 763, 50 Hun 603, 2 N. Y. Supp. 787.

Duty to Exercise Watchfulness.

1. In General.

Reasonable care requires a street-car driver to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons to use all reasonable efforts to avoid injuring them. *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. 1007.

If, with due attention, the motorman of a street car could and should have perceived a child of tender age on or straying near the tracks under circumstances indicating the great danger of the child, the motorman should seasonably use the preventive means to avert the accident; and his failure in that respect, resulting in injury to the child, will make the railroad company liable for the injury. *Nelson v. Crescent City R. Co. (La.)*, 7 Am. & Eng. R. Cas., N. S., 192.

The driver of a street car should be in a place and in a condition

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to exercise a reasonable degree of care and vigilance in watching and observing the street ahead of him, so as to prevent collisions and avoid injury to pedestrians, children as well as adults, who may be upon the public way. *Anderson v. Minneapolis St. R. Co.*, 43 Am. & Eng. R. Cas. 294, 42 Minn. 490, 44 N. W. 518.

In a large, populous city, where all descriptions of vehicles are constantly passing and repassing, as well as persons on foot, including the aged and infirm, and children who are young and wanting in prudence and discretion, it is the duty of drivers of cars not only to see that the track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track. *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534, 14 Am. Ry. Rep. 272.

A motorman in charge of an electric traction car moving in the public streets, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of his car. *Bergen County Traction Co. v. Heitman* (N. J.), 11 Am. & Eng. R. Cas., N. S., 286.

In this case the court said: "In this class of casualties, involving injuries by the cars of electric traction companies, going often with great rapidity in the public highways, motormen are properly held to a careful and constant lookout for every movement of human life in their front, and especially for the movements of children who are of such tender years as to be deemed incapable of contributory negligence."

When a street car is approaching a public crossing, it is the duty of the driver to look forward. Proof that the driver was looking backward at a car which had just passed, and ran over a boy, is evidence of such negligence as to make the company liable. *Collins v. South Boston Horse R. Co.*, 26 Am. & Eng. R. Cas. 371, 142 Mass. 301, 7 N. E. 856.

In this case the court said: "The driver of a horse car, in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected. And among these may be reckoned risks arising from the heedlessness and indiscretion of children."

The duty of watchfulness rests upon the driver of a street car approaching a street crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill, and across the car track, although such conduct on the part of the children is unlawful. *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. 690.

More than ordinary vigilance and care is required of a street-car company operating its lines across a public street crossing much frequented by children going to and returning from school at a time when they may reasonably be expected to use it. *Wallace v. City & Suburban R. Co.* (Ore.), 37 Pac. Rep. 477.

Where an injury to a small child occurs upon a public street in daylight and there is no evidence to show whether the driver of the car which inflicted the injury saw the child or not, the mere fact of the accident is sufficient to establish negligence. *San Antonio St. R. Co. v. Mechler* (Tex.), 30 S. W. 899.

An electric street-railway company should so operate its line as to protect the lives of children and others who have a right to use the street, and it is guilty of negligence if it fail to exercise ordinary care for the protection of children if their parents or guardians have done nothing to unnecessarily expose them to danger. *Riley v. Salt Lake R. T. Co.* (Utah), 37 Pac. Rep. 681.

In an action against a street-car company for an injury to a child, the court charged that if the driver saw the child in the street approaching the car, and in such close proximity that it might reach the track before the car passed, it was negligence on his part not to stop: *held*, that this was error; that the standard of duty in such a case was a shifting one and for the jury. *Philadelphia City Pass.*

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R. Co. v. Henrice, 4 Am. & Eng. R. Cas. 544, 92 Pa. St. 431, 37 Am. Rep. 699.

Illustrations.

A child attempted to cross the street in front of her father's store to join a companion on the other side. The track of defendant's road was about twelve feet from the sidewalk. As she stepped down into the street an approaching car was fifty feet or more distant. At about that time the speed of the car was increased; its driver was looking back into the car. The child was struck by the car and killed: *held*, that a nonsuit was improperly granted. Stone v. Dry Dock, E. B. & B. R. Co., 38 Am. & Eng. R. Cas. 489, 115 N. Y. 104, 21 N. E. 712, 23 N. Y. S. R. 551.

Where it appeared that decedent was a child six years of age, about four feet in height, and possessed of the ordinary intelligence of his years; that he had been in the habit of going on errands for his mother for a period of six months prior to the date of the accident; that on the afternoon of September 3, 1892, deceased was sent by his mother on an errand, and started to cross the Flatbush avenue from the west curb, and when about twelve or fifteen feet from the curb he stopped to pick up something, then proceeded across the avenue, and was struck by the horses of one of defendant's cars; and it also appeared that, at and just before the accident, the car was going very fast, the driver was not looking ahead of him, but was engaged in conversation with a passenger and had his head turned to one side; that he did not see the boy, or even know that he had run over him until the conductor whistled for him to stop the car, and when the driver looked around to the conductor, the latter pointed back to the body of the boy then lying on the track to the rear of the car; that the car went about seventy-five feet from where the boy was lying before it stopped; that there was no obstruction to prevent the driver from seeing the boy, if he had been looking ahead and attending to his duties: *held*, that this evidence clearly made out a case of negligence on the part of the driver, and established a state of facts which made it proper to submit to a jury the question of the driver's negligence. Mason v. Atlantic Ave. R. Co., 4 Misc. (N. Y.) 291, 24 N. Y. Supp. 139, 53 N. Y. S. R. 454.

In an action against a street-car company for an injury to a child about six and a half years old, it was conceded that the car had no conductor, and there was evidence tending to show that the driver at the time was directing his attention to the rear of the car and was not on the lookout for foot-travelers crossing the street, but such evidence was contradicted by witnesses for the defense: *held*, that it was the right of the jury to discredit the evidence for the defendant and to render a verdict for the plaintiff. Agnew v. Brooklyn City R. Co., 24 N. Y. S. R. 744.

A child about three and a half years old escaped from his mother, who was engaged in a bakery, and ran across the street with another boy about ten years old, but immediately upon crossing the street some one called to him and he started to recross the street, and was injured by a car which was being driven with the horses in a gallop, with the driver looking backward: *held*, under the circumstances, that the mother was not negligent in allowing the child to go to the sidewalk, from which it escaped to the street; and there was such proof of negligence on the part of the driver as to justify a verdict for the plaintiff. Ehrman v. Brooklyn City R. Co., 38 N. Y. S. R. 990, 60 Hun 580, 14 N. Y. Supp. 336.

A child two and a half years old was first seen by a car driver between the rails and under the whiffletrees, and before he could then stop the car she was injured. It appeared that immediately before discovering the child the driver had turned his back to give change to a passenger, but it appeared, under the whole circumstances of the case, that by proper care the accident might have been averted: *held* sufficient evidence of negligence to sustain a verdict for the plaintiff.

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Hyland v. Yonkers R. Co., 22 N. Y. S. R. 100, 51 Hun 643, mem., 4 N. Y. Supp. 305.

Proof that a child is run over by a horse car, and that the driver was not paying any attention to things outside, or in front of him, but was giving his attention to something inside the car, and did not turn to look forward until he heard the people screaming on the street, is sufficient proof of negligence to warrant a jury in finding for the plaintiff. *Levey v. Dry Dock, E. B. & B. R. Co.*, 35 N. Y. S. R. 769, 58 Hun 610, 12 N. Y. Supp. 485.

The gripman of a cable car testified that upon approaching a curve at the intersection of two streets he saw a child upon the sidewalk, and that he looked out and noticed that the track was clear and went on. There was other evidence to the effect that the child toddled along for a distance of at least 35 feet on the street, and in the direction of the approaching car after the gripman saw him upon the sidewalk, and it appeared that if the gripman had kept a diligent lookout he would have discovered the child in time to prevent the injury: *held*, that the evidence was sufficient to sustain a judgment against the company. *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 40 Am. & Eng. R. Cas. 261.

A child four years of age started to run across a street at about the middle of the block, fell about four feet in front of a horse drawing defendant's street car, moving at a slow trot, and was run over. There was evidence that it was dark at the time, but sufficiently light to enable one to distinctly see the child half way across the street; that to the driver's knowledge the street at this point was much frequented by children; that the car could have been stopped within a distance of two feet; that the driver was giving no attention to the track in front of him and did not see the child before the car passed over him: *held*, that the question of negligence was properly submitted to the jury. *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 18 S. W. 890.

In an action against an electric street railway, there was evidence tending to show that plaintiff, a boy about eleven years of age, was guilty of contributory negligence in standing upon defendant's track until struck by the car; but also evidence tending to show that the motorman should have seen plaintiff in time to avoid injuring him: *held*, that it was not error to refuse to direct a verdict for defendant. *Baltimore City Pass. Ry. Co. v. Cooney (Md.)*, 11 Am. & Eng. R. Cas., N. S., 759.

In an action for the death of a boy six years old who was run over by a cable car, it is proper to submit the case to the jury where there is evidence that at the time of the accident the gripman was standing on the side of the cab with one hand out of the window, and looking towards the houses he was passing; that he did not have hold of the grip or brake; and that when hallooed to by persons who saw the child on the track when the car was two and one half lengths away, he paid no attention to the warning. *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, 25 Atl. Rep. 650.

Where the evidence is conflicting as to how long a child had been sitting on the track of a street railway, or at what distance the driver might have seen it had his attention been directed to the fact, and whether, about the time in relation to the occurrence the driver had his face turned toward the sidewalk, the disputed questions are for the jury. *Johnson v. Reading City Pass. R. Co. (Pa.)*, 28 Atl. 1001.

Evidence that the gripman of a cable car did not keep such a lookout as the circumstances demanded, nor give warning of its approach, and that at the discovery of a child of tender years on the track on or near the crossing, the car might have been stopped sooner had the brakes been in proper condition, is sufficient to justify the submission of the question of negligence and contributory negligence to the jury. *Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341.

In an action against a street-railway company to recover for the death of a child less than two years of age, it appeared that the cas-

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ualty occurred on a clear, bright day at a place where the driver had full view ahead of him; that when the car was within thirty feet of the child, the attention of the driver was called to its presence; that the driver was holding the reins with both hands and looking backward engaged in conversation, instead of holding the lines in one hand and having the other hand on the brake, which the testimony showed was a correct position for him to assume; that the car could be stopped within six feet, and that after the child was run over, the car was not stopped until it had proceeded over sixty feet from where the driver's attention had been called to its presence. It was held, that a verdict against the company was justified by the evidence. *Czezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911.

A child seventeen months old left the sidewalk and went on the street-car track thirteen feet away, in plain view of the driver of an approaching car, if he had been looking. When the child started the car was from fifty or sixty feet distant and could have been stopped with ease within one-third of that distance, but the driver was looking to one side and to the rear of the car, and did not see the child in time to avoid the accident: *held*, such proof of negligence as to justify a jury in finding for the plaintiff. *Weissner v. St. Paul City R. Co.*, 47 Minn. 468, 50 N. W. 606.

A child two and a half years old escaped from her house and was injured by a horse car. The car was being pulled up a grade by the two regular horses and a helper, or "tow-horse," in front. The car was in charge of a conductor and driver, with a boy leading the tow-horse. One witness testified that he saw the child entering the track while the car was some ten feet away, and heard people shouting to the driver to stop, and a moment later saw the child knocked down by one of the horses. Both the driver and the boy testified that they were looking ahead and did not see the child, and knew nothing of the accident until the conductor gave the signal to stop, which was after the injury: *held*, that a verdict against the company would not be set aside on the ground that it was not supported by the evidence. *Giraldo v. Coney Island & B. R. Co.*, 16 N. Y. Supp. 774, 62 Hun 620, 42 N. Y. S. R. 915.

But where it appeared that a car driver, while driving at a proper rate of speed, saw a child standing near the track some 60 feet away, and again when about 20 feet distant, when his attention was directed to children on the other side of the track for a moment, and in looking again when his horse was within three to five feet of the crossing where the child stood, it was seen approaching the track in front of the horse, and then it was impossible to stop the horse in time to avoid injury, it was held, that it was not the duty of the driver to have stopped the car either the first or second time that he noticed the child; that the company was not bound to move its cars at a walking pace, and that no negligence was shown. *Citizens' St. R. Co. v. Carey*, 56 Ind. 396, 18 Am. Ry. Rep. 126.

So in *Boland v. Missouri R. Co.*, 36 Mo. 484, where it appeared that a child two years old, unattended, was crossing one of the most public thoroughfares of the city of St. Louis, and was seen approaching a track in front of a moving car; that the bystanders, seeing her danger, shouted to the driver to stop, but, his attention being turned in another direction where he anticipated danger, and that he did not stop till the child was run over and killed: *held*, that the company was not liable.

In *Block v. Harlem Bridge, M. & F. R. Co.*, 28 N. Y. S. R. 495, 55 Hun 607, 9 N. Y. Supp. 164, it happened that a boy seven years old had crossed a street to a point between two railroad tracks, where cars moving in opposite directions on each track were in full sight, and he undertook to retrace his steps, but fell on the track and was killed, and that bystanders called to the driver, but he made no effort to stop his car: *held*, that the question of defendant's negligence was for the jury.

A child three years old was permitted to go on the street in com-

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pany with a little sister only, but at the time of the accident was riding on a wagon in charge of an adult, from which he was jostled off and fell some twenty-five feet in front of a street car. Several persons shouted to the driver, and there was nothing to prevent him seeing the child. The car could have been stopped in ten or twelve feet: *held*, that the negligence in permitting the child to go out in charge of his sister was too remote to affect the right of recovery against the company, and that the question of negligence in permitting him to ride on the wagon, where he might be jostled off, was for the jury. *Bahrenburgh v. Brooklyn City, H. P. & P. P. R. Co.*, 56 N. Y. 652.

JONES *et al.* v. UNITED TRACTION CO.

(*Supreme Court of Pennsylvania, Jan. 6, 1902.*)

[50 Atl. Rep. 826.]

Street Railways—Negligence—Evidence.*

Where a child two years old was walking on a street car track towards a car approaching on an adjoining track, and crossed over onto such track about two car lengths in front of the car, and was run down, there being nothing to obstruct the view of the motorman, a finding that he was negligent is justified.

Appeal from court of common pleas, Allegheny county.

Action by Ruth E. Jones, by her next friend, and another, against the United Traction Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Knox & Reed and Edwin W. Smith, for appellant.

Thos. M. & Rody P. Marshall, for appellees.

BROWN, J. On September 9, 1899, when Ruth E. Jones was injured, she was not quite two years old. No negligence can be imputed to her, and that charged against the defendant company is that the motorman, when he saw the child, or ought to have seen her, on the track in front of him, or approaching it from the west-bound track, did not stop the car, or get it under control, so as to avoid the collision. The accident occurred on Penn avenue, the principal thoroughfare in the borough of Turtle Creek. At the point of collision there were two tracks of the United Traction Company, and the child was struck on the east-bound one by a car going towards Wilmerding. The other, or west-bound, track, was for cars going towards Pittsburg. The testimony of V. J. Buck, the only witness to the occurrence, called by the plaintiff, was that he was on the side of the street next to the west-bound track, when he saw the child on it, facing the approaching car, about 150 feet from where he was standing, and that the car was about the same distance west of the child, or 300 feet from him; that he saw her going up the west-bound track, and, fearing an accident, started to run for her, and when she was about two car lengths from the car she crossed over to the east-bound track, and was struck; that he

*See preceding case and notes.

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saw the car as soon as he saw the child, and the motorman was in plain view, and when she crossed over to the east-bound track, about two car lengths in front of the car, he waved for the motorman to stop. According to this testimony, even if there was a curve in the tracks, and piles of brick and sand were alongside the east-bound one, upon which the car was coming, there was a line of vision of 300 feet between the motorman and the witness when the latter, from the pavement, saw the child on the west-bound track, half way between them; and the motorman, on the east-bound track, therefore saw, or ought to have seen, her 150 feet ahead of him. She was not at that time, it is true, on his track, but he was bound to know that in her childish caprice she was as likely to cross over in front of his moving car as to go back to the pavement; and his duty, the instant he saw her, or, if exercising proper care and watchfulness, he ought to have seen her, was to stop or to so absolutely control his car as to avoid the risk before him. The witness says, as stated, that when the child was on the east-bound track two car lengths ahead of the coming car he waved to the motorman, in plain view of him, to stop; and at the moderate rate of speed the car was running it was for the jury to say whether there was negligence in not stopping before the child was reached. It is not to be conceived that the motorman willfully ran his car upon this little child, but, according to the testimony to which we have referred, in running his car he was not properly regardful of his duty to look constantly ahead of him, on the alert to avoid just what happened.

The plaintiff's case, as made out, was clearly for the jury, and nothing developed in the defense could have justified the court in taking it from them. Their finding that the motorman was careless was fully warranted, and the judgment is affirmed.

NOLDER v. MCKEESPORT, W. & D. RY. CO.

(Supreme Court of Pennsylvania, Jan. 6, 1902.)

[50 Atl. Rep. 948.]

Street Railways—Personal Injuries—Pedestrians—Infants—Evidence—Trial—Question for Jury.*

Where, in an action for personal injuries to a child by being struck by defendant's street car, there was evidence that the car was moving at an unusual rate, and the motorman stated that it was going at the rate that full power would take it,—“going as fast as the car could

*See preceding case and foot-note.

As to the degree of care required of children for their own protection, see *Geist v. Missouri Pac. Ry. Co.* (Neb.), 22 Am. & Eng. R. Cas., N. S., 364, 87 N. W. Rep. 43, and foot-note, 365; 2 Rap. & Mack's Dig. 764 et seq.

As to the contributory negligence of children in running in front of moving street car, see note, 10 Am. & Eng. R. Cas., N. S., 818 et seq.

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go,"—and that the child started to cross the street when the car was at least 100 feet away, and that she was in plain view of the motorman, who could readily have seen her in time to have stopped the car, there was no error in submitting the case to the jury.

Appeal from court of common pleas, Allegheny county.

Action by A. S. Nolder in his own right, and as next friend of Anna Bell Nolder, against the McKeesport, Wilmerding & Duquesne Railway Company. From separate judgments in favor of the plaintiff, defendant appeals. Affirmed.

Dalzell, Scott & Gordon, for appellant.

T. C. Jones and J. C. Boyer, for appellee.

PER CURIAM. It is a fair inference from the testimony that no error was committed by the court in the submission of the case to the jury. There was considerable evidence showing that the car was moving at an unusual rate of speed. The motorman, referring to it on cross-examination, said, "We were going at the rate that full power takes us," "and were going as fast as the car could go." There was testimony showing that the child started to cross the street when the car was at least 100 feet away, and she was in plain view of the motorman, who could readily have seen her in time to have stopped the car. See *Koersen v. Railway Co.*, 198 Pa. 26, 47 Atl. 850.

And now, to wit, January 23, 1901, the jurors impaneled in above-entitled case find in favor of plaintiff, for A. S. Nolder, in his own right, \$550, and for Anna Bell Nolder, \$2,250. January 30, 1901, judgment entered on the verdict.

Judgment affirmed.

MARTIN v. CHICAGO, R. I. & P. R. Co.

(*Supreme Court of Iowa, Oct. 18, 1901.*)

[87 N. W. Rep. 654.]

Injury to Employee—Assumption of Risk—Speed in Violation of Ordinance.*

A brakeman on a freight train, knowing that trains are run at a speed in excess of that provided by a city ordinance, and not protesting, assumes the risks incident thereto.

Same—Same—Inclement Weather.

A brakeman on a freight train assumes the risks which inclement weather conditions add to his employment.

Appeal from district court, Scott county; James W. Ballinger, Judge.

Action to recover damages for causing the death of plaintiff's intestate. At the close of all the evidence defendant's motion for a verdict was sustained, and judgment for defendant rendered accordingly. Plaintiff appeals. Affirmed.

E. M. Sharron and Ely & Bush, for appellant.

Cook & Dodge, for appellee.

*See notes at end of case.

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GIVEN, C. J. 1. Defendant moved for a verdict on the following grounds: "(1) That there is no evidence that the death of A. F. Flannagan was caused by any act of the defendant; (2) that the undisputed evidence of plaintiff's witnesses shows that the death was caused or contributed to by his own negligence; (3) that deceased had assumed the risk incident to the act charged as negligence on the part of the defendant, namely, running the train on which deceased was employed at an unlawful, dangerous, and reckless rate of speed." In view of the conclusion we reach, it is not proper that we discuss what the evidence establishes, but simply what it tends to establish. Deceased was in the employ of the defendant for some time prior to his death. He was an experienced brakeman on freight trains, and was familiar with the tracks and surroundings at the place of this accident. On the early morning of January 26, 1896, he took his place as head brakeman on a heavy freight train westward bound, at Rock Island. The morning was inclement,—11 above zero, humidity 90 per cent., the wind blowing five miles an hour from the west or northwest, and exposed objects covered with frost. In leaving the city of Davenport the train ascended a heavy grade requiring the use of a second engine, or "helper," which was attached ahead with the regular engine. At and near the place of the accident the track on which this train was moving passes the junction of the southern division of defendant's road, and five or more switches are within the limits of the city of Davenport. There was an ordinance of the city and a rule of the company limiting the speed of trains to six miles per hour within the city limits. The evidence as to speed of this train varies from 12 to 40 miles; those in position to know best placing it at 14 to 17, but all agreeing that it was in excess of 6 miles. The testimony tends to show that high cars swing more than lower ones, that all sway more in passing switches than on plain track, and more at a high than at low speed. Deceased was last seen on top of the fourth car from the engine, the smoke and steam from which was blown back over the train. He was recognized by the light he carried, it being yet dark. Marks found upon the front of the fourth car indicate that he fell between it and the third car. His body was crushed by the wheels so as to cause instant death. During all the time that deceased was in the employment of the defendant it was customary to run freight trains on this part of the road in the same manner and at the same speed that the train upon which he was serving was run that morning, and these facts were known to the deceased. The charge is that defendant was negligent in running this train at the speed it did, because in excess of that allowed by the ordinance of the city, and because of the conditions of the weather, etc., under which the train was run. In accepting his employment the deceased assumed all the ordinary risks incident thereto. He also assumed risks incident to neglect

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or omissions upon the part of the defendant of which he had knowledge, and as to which he made no protest or complaint. The deceased knew that freight trains were run upon this part of the road, and in this direction, at a speed in excess of that provided in the ordinance, and he continued in the employment of the defendant without protest or promise as to such speed, and therefore must be taken to have assumed the risks incident thereto. This being true, the ordinance furnishes no basis for recovery. Railway companies do not adjust their time schedules for trains to the conditions of the weather. Aside from said ordinance, the defendant had a right to run its train at the speed it did whether the weather was fair or foul, and in accepting the employment the deceased assumed the risks incident to the condition of the weather. He assumed the risks incident to the performance of his duties as a brakeman by day or by night, and in foul as well as in fair weather. He remained in his employment without protest or promise, knowing that freight trains were run up the grade at the speed at which this train was run, regardless of the condition of the weather, or any other conditions that did not imperil the safety of the train itself. We think, on the undisputed evidence, defendant's motion for a verdict was properly sustained on the third ground thereof, and, entertaining this view, it is unnecessary that we consider the other grounds of the motion.

Affirmed.

WATERMAN, J., taking no part.

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**MASTER'S LIABILITY FOR INJURIES TO EMPLOYEES
CAUSED BY EXCESSIVE SPEED AND SPEED IN
VIOLATION OF ORDINANCES.**

EXCESSIVE SPEED.

In General.

A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but in doing so, those in charge of the train should use greater vigilance and care to prevent accident to workmen on the track. *Stephens v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 538, 86 Mo. 221.

Speed Must Be Cause of Injury.

The fact that a train was run at an unlawful rate of speed within a city is no ground for imputing negligence to the railway company, as between it and its employee, where there is no evidence that the injury to the latter was caused by collision with any object. *Lockwood v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. Cas. 151, 55 Wis. 50, 12 N. W. 401.

Not Negligence of Fellow Servant.

Where a railroad company permits its employees to habitually disregard the safeguards provided to insure the safe running of its trains, this is a neglect of duty which the company owes to its other employees, as much as permitting the use of defective machinery. *Coppins v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 618, 122 N. Y. 557, 25 N. E. Rep. 915, 34 N. Y. S. R. 214, affirming 48 Hun 292, 17 N. Y. S. R. 916.

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Where the liability of a railroad company for injury to one of its track repairers, by the careless manner of running a train, is in issue, evidence tending to show that the train causing the injury was in charge of a conductor and engineer, and was at the time engaged in a race at a high and dangerous rate of speed with a train on a parallel road, over several public crossings, on a curve on which the track repairer was at work, in a city limits, and where trains should be run with care, corresponding with the circumstances, without sound of bell or whistle, or slack of speed, or any other precaution to warn the men engaged at work on the track of approaching danger, is competent to go to the jury, and should be submitted to it under proper instructions upon the issue joined, and it was error in the court to grant a nonsuit on the assumption that the negligence and carelessness causing the injury was that of a coemployee in the same service, and not that of the company. *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio St. 389, 8 Am. & Eng. R. Cas. 101.

Statute Not Applicable to Employees.

Section 1047 of the Mississippi Code of 1880, does not embrace employees among those to whom a right of action is thereby given when railroad companies run their trains at a higher rate of speed than six miles an hour through any town, city, or village. *Dowell v. Vicksburg & M. R. Co.*, 18 Am. & Eng. R. Cas. 42, 61 Miss. 519.

In this case it is said in the opinion: "Aside from authority, we consider it better policy to deny to employees a right to recover for violations of law in which they are themselves the actors. The statute forbidding a greater speed than six miles an hour in towns is more likely to be observed by employees on trains if they are required to take all risk of violating it. To permit them to violate the statute and to derive advantage from it would serve to tempt to disregard it."

Assumption of Risk.

A brakeman in entering the service of a company only assumes such dangers as are incident to the operation of the road in a reasonably prudent and careful manner, and he does not assume the risk of dangers arising from running the trains at too great a speed. *Conners v. Burlington, C. R. & N. R. Co.*, 74 Iowa 383, 37 N. W. 966.

A civil engineer employed by a railroad company in the construction of its road only assumes the risks incidental to the operation of the trains over a new, partly completed roadbed and unballasted track, in a reasonably prudent and careful manner, and does not assume risks which are the result of running trains at an unreasonably high rate of speed over such track. *Meloy v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 130, 77 Iowa 743, 42 N. W. 563.

Though a train be a "repair train," and the employees thereon may have assumed, in accepting employment thereon, that they may be in greater danger of accident than they might be under other circumstances, they have the right to assume that, this very fact of increased danger being known to the conductor, he will guide his conduct so as to minimize the danger by the increased care and precautions which the occasion calls for, and they do not assume the risk of the derailment of the train by the falling of a cross-tie, due to the rocking of the cars from excessive speed. *Wilson v. Louisiana & N. W. R. Co.*, 51 La. Ann. 1133, 25 So. Rep. 961, 14 Am. & Eng. R. Cas., N. S., 648.

An employee of a city working on the railroad track does not assume the risk of the train hired by the city being run at an unreasonable speed over a switch. *Coughlan v. Cambridge (Mass.)*, 44 N. E. 218.

SPEED IN VIOLATION OF ORDINANCES.**In General.**

An employee of a railroad company, injured by reason of the violation of an ordinance regulating speed, but not participating therein, can maintain an action against the company for the injuries so

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received. *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. 1103.

Not for Protection of General Public Only.

A railroad company cannot escape liability for the death of an employee killed by its train moving within city limits at a speed, and under conditions prohibited by an ordinance of the city, upon the ground that such ordinance was for the protection of the general public only. *Pittsburg, etc., Ry. Co. v. Moore (Ind.)*, 14 Am. & Eng. R. Cas., N. S., 678.

In this case it is said in the opinion: "While we apply the rule that a servant must look out for his own safety, and heed, at his peril, all open and ordinary dangers, we must also give force to the correlative rule, equally well established, that the servant himself, observing due care, has a right to believe, and to rely upon his belief, that the master has done his duty in the promotion of safety; and in this instance the deceased had a right to believe that appellant would obey the city ordinance which forbade the running of trains through the city at a greater rate of speed than six miles an hour, and that required all backing trains, or reversed engines with tenders in front, after night, to carry a light in front, and to sound the whistle and ring the bell. A disregard of the ordinance, under section 7083, *supra*, will extend to the engineer in the employ of appellant, and in charge and management of its locomotive and train; and if said ordinance was disobeyed by said engineer, as averred, the jury would have the right to impute such disobedience as negligence. *Swindell v. State*, 143 Ind. 153-168, 42 N. E. 528; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843. It will not do to say, as appellant contends, that the deceased, being in the service of the company, and familiar with the needs of the service, in running trains backward and forward through the yards, and sometimes at a great rate of speed, was not entitled to the protection afforded by the ordinance. The power of a city to pass such an ordinance is conferred as police power for the protection of the public, and all the public; and because the deceased happened to be in the service of the company, within the inhibited territory, presents no reason for depriving him of its protection. *Railway Co. v. Eggman (Ill. Sup.)*, 9 Am. & Eng. R. Cas., N. S., 438, 48 N. E. 981; *Railroad Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *Bluedorn v. Railroad Co.*, 108 Mo. 439, 18 S. W. 1103. It follows, therefore, that the jury had the right to find, if the evidence warranted, that obedience to the city ordinances was a duty owing by appellant to the deceased, and its violation was not an assumed risk, but negligence of appellant."

Excessive Speed and Defective Appliances.

An engineer injured while running his train within city limits at a rate of speed higher than that permissible under an ordinance of the city, cannot recover for such injury, if such excessive speed was the proximate cause thereof, whether or not the company was negligent in regard to appliances. *Missouri, K. & T. Ry. Co. v. Roberts (Tex. App. Civ. Cas.)*, 11 Am. & Eng. R. Cas., N. S., 21.

In this case the court said: "It is the uniform ruling in this state that running an engine within the limits of a city at a higher rate of speed than that fixed by ordinance is negligence, as a matter of law; and that the engineer in this case was violating such an ordinance if he was going at a higher rate of speed than six miles is clear. If the violation of that ordinance was the proximate cause of his injury, then he is not entitled to recover. The fact that his employer may have known that the ordinance was regularly violated by its employees, or even the fact that it may have commanded its violation, would not relieve appellee from the effects of his disregard of the law. If his act in violating the ordinance concurred with the negligence of the appellant in producing the result, he cannot recover. We can see no reason in the contention that, while appellee's acts in violating an ordinance might be negligence per se as to the general

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public, it would not be so as between master and servant, especially when the former has countenanced the violation of the law. If it was negligence in one case, it would be in the other."

Not Negligence Per Se.

Negligence in running a train through a city at a greater rate of speed than is allowed by an ordinance will not defeat a recovery for an injury to an employee, where the speed of the train does not cause the injury. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. 237, affirming 33 Ill. App. 405.

Assumption of Risk.

A track repairer, in the employ of a railroad company, does not assume the risk resulting from the company's nonobservance of a city ordinance regulating the operation of trains within the city. *Baltimore, etc., Ry. Co. v. Peterson (Ind.)*, 20 Am. & Eng. R. Cas., N. S., 887.

ILLINOIS CENT. R. CO. v. GHEEN.

(*Court of Appeals of Kentucky, Feb. 12, 1902.*)

[66 S. W. Rep. 639.]

Hospital Maintained by Contributions of Employees—Liability for Refusal to Give Certificate of Admission.

Where each employee of a railroad company on a certain division employed as much as four days in a month was required by the company to contribute to the maintenance and support of a hospital, the sum assessed against him according to his wages being withheld by the company's paymaster out of his wages and turned into the hospital fund, which was held by the company's treasurer, and the employees making the payments had no voice in the management or control of the hospital except that superior employees gave to subordinates certificates of admission when they were sick or injured, plaintiff, an employee, who was injured after being employed more than four days, was entitled to admission to the hospital, and for injury resulting from the refusal of his foreman to give him a certificate entitling him to transportation and entrance to the hospital the company is liable.

Same—Same—Measure of Damages.

If plaintiff was entitled to admission to the hospital, he was entitled to the skilled surgical treatment and accommodations he would have received there, and also to board and transportation, and if the company refused to furnish these things it is liable for the cost thereof.

Same—Same—Aggravation of Injury.

Where plaintiff, instead of employing medical attention, contented himself to accept the services of the local surgeon of the company, the company is not liable for any aggravation of his injury by the failure of that surgeon to give him proper and necessary treatment, as he should have procured such treatment elsewhere; it being his duty to do all that he could to keep down the damage.

Appeal from circuit court, Livingston county.

"To be officially reported."

Action by T. W. Gheen against the Illinois Central Railroad Company to recover damages for defendant's refusal to admit plaintiff to a hospital. Judgment for plaintiff, and defendant appeals. Reversed.

Quigley & Quigley and Pirtle & Trabue, for appellant.

J. W. Bush, C. C. Grassham, and Molloy & Utley, for appellee.

WHITE, J. The appellee brought this action for damages for refusal to admit him into the hospital at Paducah after he had received an injury to his hand, and, as is alleged, he was deprived of prompt and proper medical treatment, and by reason of the failure to have such proper treatment amputation of three fingers of his hand became necessary. It is alleged that the hospital at Paducah is kept by appellant, under its supervision and control, and the cost of maintenance thereof is deducted from the wages of the railroad employees according to a fixed scale, each employee contributing by the deduction and withholding of such part of the wages due him. Appellant by answer denied that it conducted or controlled the hospital, but alleged that it was a voluntary association, composed of the railroad employees of the division from Louisville to Memphis, and that the appellant company only acted in a friendly way toward the institution, and rendered friendly and gratuitous services to it and the employees, in collecting and disbursing the funds necessary to maintain the hospital, and, further, that the appellant furnished transportation to the hospital for any employee entitled to treatment therein. Appellant denied all responsibility for the hospital management or liabilities. Further answering, the appellant denied that appellee was entitled to admission to the hospital, or that he was injured or damaged by reason of not being admitted to the hospital earlier than he was. It appears that appellee was finally admitted and treated, and it was in the hospital that his fingers were amputated. There is no claim of liability of appellant by reason of the injury originally. That is expressly disclaimed in the petition. The claim is for increased injury by reason of not being admitted to the hospital for treatment in time to prevent the loss of the fingers and the suffering occasioned thereby.

Upon the issues presented the case was tried, and a verdict and judgment resulted in favor of appellee for \$1,000. The case is here upon appeal from that judgment. The reasons and motion for new trial assign as error the action of the court in sustaining a demurrer to the plea to the jurisdiction of the Livingston circuit court, error in instructions given, and that the amount of the judgment is excessive.

The plea to the jurisdiction presents the fact that at the time the suit was brought appellant had a chief officer and agent residing in this state in Jefferson county, to wit, a division superintendent. It appears from the petition that appellee was employed and injured in Livingston county, and was refused a certificate entitling him to admission into the hospital by his foreman in Livingston county. The line of railroad runs through Livingston county. The hospital is in McCracken county. In our opinion, the Livingston circuit court had jurisdiction of the action. If wrong was done appellee at all, it was in Livingston county. His cause of action, if he had any, accrued wholly in that county.

The court on the trial gave three instructions, as follows:

“(1) The court says to the jury if they believe from the evidence that plaintiff was employed and labored for the defendant, and while thus engaged he received an injury to his hand, then he has the right to admission at once into said hospital for treatment; and if the jury further believe from the evidence that defendant, by its officers and agents governing said hospital, and that plaintiff was refused a certificate of admission to said hospital, and if plaintiff suffered any additional pain or injury by reason thereof, then the law is for the plaintiff, and the jury will so find for him as in instruction No. 3.

“(2) If the jury believe from the evidence that said hospital was governed and controlled by the laborers of the defendant, and not by the officers of defendant, or that plaintiff was not injured or damaged by reason of defendant's agent in refusing him admission to said hospital, then, in either case, the jury will find for defendant.

“(3) The court says to the jury if, under the evidence and instructions, they find for plaintiff, they will find only such damages as will compensate him for any additional pain and suffering endured by him, if any, from the time he made application for admission and the time he was admitted into said hospital; that is, the excess of pain and suffering, if any, that he endured over that which he would have endured if he had been treated in the hospital, and for the loss of his fingers and power to earn money, and mental and physical suffering by reason thereof, provided the jury believe from the evidence that his fingers could and would have been saved if he had been permitted to enter said hospital when he first applied for admission; but in no event can the jury allow him more than two thousand dollars, the amount claimed in his petition.”

There was objection and exception to each of these instructions by appellant. It is earnestly insisted that these instructions are prejudicial to appellant, and are not correct statements of the law applicable to the case. The testimony as to the formation, conduct, and management of the hospital presents no material disagreement as to the facts. These appear to be that each employee on the Louisville & Memphis division, who is employed as much as four days in a month, contributes to the maintenance and support of the hospital. The sum payable is fixed by a scale according to wages earned per month, and the amount payable is withheld by the paymaster of appellant out of the wages due the employee and turned into the hospital fund, which is held by the treasurer of appellant. The hospital association is not incorporated, nor, on the other hand, is it purely voluntary. If the fact that an employee has no option about paying out of his earnings the fixed assessment for the support of the hospital could be termed a voluntary payment, then the hospital asso-

ciation might be termed a voluntary association. It has a board of directors, but these are such, save two, by reason of the official position with appellant's road. The two exceptions are a conductor and engineer, who are selected by the other members. The surgeon in charge is practically appointed by the chief surgeon of appellant. The men who contribute the monthly assessment to pay the hospital expenses have in fact no voice in the management or control of the hospital, save and except that of giving certificates of admission thereto to subordinate employees when sick or injured. Employees of the class of appellee have no rights or powers in regard to the hospital, save that of paying the monthly assessments, which in fact they never see, and the right of treatment in case of injury or sickness. As to the ownership of the hospital grounds and buildings and equipment, there is no proof. We are of opinion that these facts, proven without serious, if any, contradiction, would have authorized the court to instruct the jury peremptorily that, if appellee had been engaged more than four days, he was entitled to admission into the hospital, and if he was refused permission to enter, or certificate entitling him to transportation and entrance to the hospital, and was injured by such refusal, he was entitled to recover. It is clear that if appellant corporation ceased to exist, or should attempt to withdraw from the hospital, the hospital would cease to be of any service. The appellant is the very life of the hospital association. Its funds, management, control, and service are all furnished by appellant.

In fact, the hospital association is the Illinois Central Railroad. In this view, instructions 1 and 2, given, are more favorable to appellant than it was entitled to have.

However, we are of opinion that instruction No. 3, as to the measure of damage or criterion of recovery, is error. The general and universal rule of law in regard to damages is that every person must do all that can reasonably be done to render the damage for any act or omission as light as possible. Under this rule, the appellee, when he was refused admission to the hospital, if such be the case, was bound to do all that he could to keep the consequent injury and damage as light as possible. To do so, he should have employed medical and surgical attention to cure his hand, or, at least, to arrest other or further injury. For such services and attention, or the cost thereof, the appellant, if liable at all, would be required to pay. This is the reasonable requirement of the law. That course would be expected of any person, that he would use all means to prevent further injury to himself. By the proof herein appellee failed to do this, but contented himself to accept the services and treatment of the local surgeon of appellant, who seems to have pursued the same treatment given at the hospital. If that surgeon was unable for any reason to give appellee proper and necessary treatment to

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his wounds, it was the duty of appellee to procure elsewhere such attention. If he failed to do so, he cannot charge appellant with the consequent loss, suffering, or injury he received by his own failure to procure medical and surgical attention. But he can recover the reasonable cost of such medical and surgical attention that would have equaled the medical and surgical attention he would have received at the hospital if he had been admitted. Appellee was entitled, if at all, to the skilled surgical attention he would have received at the hospital of appellant, including board, transportation, and such accommodations and charges that the hospital would furnish its patients. If appellant refused to furnish such, and was bound to do so, the appellee could and should have sought such attention elsewhere, and for the reasonable cost thereof appellant would be liable. The science of medicine and surgery has not so far advanced that it could be said as a certain fact that if appellee had been admitted into the hospital, and had received the very best attention there to be had, he would not have suffered pain and mental anxiety, and that surely he would not have lost his fingers. By the establishment of the hospital, the appellant did not assume or undertake to cure disease, or in all cases relieve from injuries. The undertaking was to furnish medical and surgical attention, and to nurse and care for the patient who is admitted therein. If appellant be liable under the proof, its liability is for failure to furnish these things, and the damage for such failure is the reasonable cost at which such care and attention, board, and medical and surgical skill could have been obtained, as well as cost of transportation to the nearest suitable place where such attention could be had.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial, and for further proceedings consistent herewith. Whole court sitting.

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(Supreme Court of Indiana, Jan. 17, 1902.)

[62 N. E. Rep. 488.]

Fellow-Servant Rule—Presumption as to Law of Sister State.

The court will presume that the rule preventing recovery from a master for injury from the negligence of a fellow servant obtains in another state, and a complaint alleging such an injury in another state is demurrable.

Extraterritorial Effect of Nonexistence of Law Giving Right of Action for Wrong.

If the law of the state where a wrong is committed does not give a right of action against the wrongdoer, no action can be sustained thereupon in another state, though the wrong might have been actionable if committed in the state of the forum.

Extraterritorial Effect of Employers' Liability Act.*

Burns' Rev. St. §§ 7083-7087, making employers liable for injuries

*As to whether such statutes will be given extraterritorial effect, see 5 Rap. & Mack's Dig. 708 et seq.

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resulting from the negligence of fellow servants, can have no extraterritorial effect, so that a complaint alleging such an injury in another state is not thereby prevented from being demurrable.

Constitutionality of Employers' Liability Act Purporting to Have Extraterritorial Effect.

Inasmuch as a valid defense to an action is a vested property right, Burns' Rev. St. § 7086, providing that, in case a citizen of this state is injured in another state by the negligence of a fellow servant of a railway operating a line into or through this state, it shall not be competent for the railway to plead or prove the decisions or statutes of the state where the injury occurred in an action in this state, is an unconstitutional confiscation of property rights.

Appeal from circuit court, Pike county; E. A. Ely, Judge.

Action by Clement W. Read against the Baltimore & Ohio Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Gardiner & Gardiner and E. W. Strong, for appellant.

C. K. Thorp, for appellee.

JORDAN, C. J. This action was commenced by appellee in the Daviess circuit court to recover damages for personal injuries sustained. The cause was thereafter venued to the Pike circuit court, where a trial by a jury resulted in a verdict awarding appellee \$15,000; and, over appellant's motion for a new trial, judgment was rendered thereon against the railway company. From this judgment the company appeals, and assigns as errors (1) that the court erred in overruling its demurrer to the complaint; (2) in sustaining the demurrer of appellee to the second paragraph of answer; (3) in denying a motion for a new trial. Under the averments of the complaint, the following facts are shown: The defendant (appellant herein) is a railroad corporation owning and operating a continuous railroad which extends from the city of East St. Louis, in the state of Illinois, into and through Daviess county, in the state of Indiana, on to the city of Cincinnati, in the state of Ohio. The plaintiff was at the time of the accident, and at the time he instituted his action, a resident of the state of Indiana. On June 8, 1897, he was a servant of the defendant, engaged in its employ as a brakeman on a freight train which was being operated and run over defendant's said road from the town of Flora, in the state of Illinois, into and through Daviess county, in the state of Indiana. On said day, at the station of Clay City, in the state of Illinois, while the plaintiff was assisting in the operation and running of said freight train as such brakeman, it became and was his duty to assist in making what is denominated and known as a running or flying switch; and while so engaged he was, without any fault or negligence on his part, jerked and thrown under a moving car, which ran over and crushed one of his legs, and thereby the amputation of said limb was rendered necessary. The accident in question is alleged to have been caused by the violent and sudden start and speed of the engine attached to

the train, which engine was in charge of, and was being operated by, one Michael Griffin, a locomotive engineer then and there in the service and employ of the defendant. The plaintiff in his complaint charges the accident which occurred at Clay City, Ill., and the injury resulting therefrom, to be wholly due to the negligence of Griffin, the engineer, in the operation and management of said engine at the said time and place.

The lower court adjudged the complaint to be sufficient on demurrer. The complaint, as we have shown, discloses that the accident by which appellee was injured occurred in the state of Illinois. Consequently if he has a right of action against appellant, such right arose under the laws of the latter state. The facts conclusively show that appellee and the engineer to whose negligence the cause of the injury is imputed were, under the circumstances, at the time of the accident, nothing more than fellow servants of each other,—both in the service of appellant, their common master. He does not profess by his complaint to base his cause of action on any statute of the state of Illinois. The rule of the common law which asserts that the master is not liable in an action by one of his servants for an injury sustained through the negligence of a fellow servant is a familiar one. When tested by this rule of the common law as it prevails and is enforced in this state by our decisions, the complaint in question does not state a cause of action against appellant. We are bound to presume that the same common-law rule as recognized and enforced in this jurisdiction obtains in the state of Illinois, and is enforced by the highest court thereof in like manner as we enforce it, until the contrary is shown. Hence it must be held that, under the laws of the state in which the injury complained of was inflicted, the complaint does not state or disclose a right of action against appellant. Unless the negligent act of appellant's servant to which appellee imputes his injury, which act, as shown, occurred wholly in the state of Illinois, created a liability or right of action in that state against appellant in favor of appellee, no such right or liability can be asserted to exist elsewhere. Certainly, if no right of action existed in that state in his favor, he could carry no right of action with him by coming into the state of Indiana, and instituting a suit against appellant in the courts of the latter state. This rule of the law is universally affirmed and settled. *Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. 230. In the latter case this court, on page 176, 113 Ind., and page 233, 15 N. E., said: "All the cases agree that, whatever the law of the forum may be, the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred. *Hyde v. Railway Co.*, 61 Iowa, 441, 16 N. W. 351, 47 Am. Rep. 820; *State v. Pittsburgh & C. R. Co.*, 45 Md. 41. * * * Unless the alleged wrong

was actionable in the jurisdiction in which it was committed, there is no cause of action which can be carried to and asserted in any other jurisdiction,"—citing numerous authorities. As further supporting this proposition, see *Railroad Co. v. Carroll*, 97 Ala. 126, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163, and the many authorities therein cited on page 131, 97 Ala., and page 805, 11 South., 18 L. R. A. 433, 38 Am. St. Rep. 163; *Davis v. Railroad Co.*, 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. 69; *Railway Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *Debevoise v. Railroad Co.*, 98 N. Y. 377, 50 Am. Rep. 683; *Railroad Co. v. Whitlow's Adm'r* (Ky.) 43 S. W. 711, 41 L. R. A. 614; *Hamilton v. Railroad Co.*, 39 Kan. 56, 18 Pac. 57; *Smith v. Condry*, 1 How. 28, 11 L. Ed. 35; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, and cases there cited; *Story, Conf. Laws*, § 609. The rule that if the law of the state or jurisdiction where the wrong is committed, when applied to the case, does not give a right of action against the wrongdoer, then no action can be sustained, is so well established that we may dismiss the question without further consideration.

Counsel for appellee, however, in their argument in support of the complaint, seek to apply the provisions of the fourth clause of section 1 of the employers' liability act, passed by the legislature of this state in 1893. Acts 1893, p. 294 (sections 7083-7087, Burns' Rev. St.). The first section of this act declares "that every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: * * * Fourth. *Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, co-employee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee, or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.*" (Our italics.) By that part of the clause which we have italicized a liability against a railroad corporation is created in this state, where previous to the enactment of this statute none existed under the common-law rule. We cannot presume that the legislature intended to exceed its territorial jurisdiction or power by extending the operation and effect of this statute so as to

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create a right of action in favor of the servant against the railroad corporation for an injury sustained in a sister state through the negligence of a fellow servant, where no such right under the laws of the latter state existed. That a statute of this state prescribing a penalty or giving a right of action for a tort committed can have no extraterritorial force or effect, so as to create thereby a right of action in another state, is a well-settled rule. *Carnahan v. Telegraph Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Telegraph Co. v. Carter*, 156 Ind. 531, 60 N. E. 305, and authorities cited therein; *Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. 230. In the latter case this court said: "The general proposition may be conceded that statutes have no extraterritorial force beyond the state in which they were enacted, but it is nevertheless true that civil rights acquired under a statute are not confined to the limits of the state in which the rights accrued. Such rights, out of regard for the principles of comity existing between states, will be enforced in the courts of any state which can obtain jurisdiction of the defendant, provided to enforce them does not violate the law or policy of the state in which they are sought to be enforced." In *Nathan v. Lee*, *supra*, we said: "The general laws, regulations, or decisions of the courts of a sister state are controlling only within its own limits, and such state has no power to give them force or effect in other jurisdictions,"—citing authorities. While the law of the place where the injury was occasioned or inflicted governs in respect to the right of action, nevertheless the law of the forum where the action is prosecuted to obtain redress which pertains to the remedy, only, controls. The question whether the injured servant shall have a right of action against the master for the injury sustained through the negligence of a fellow servant is certainly one which deals with the right or cause of action, and not with the remedy or procedure to enforce such right.

It is seemingly urged by counsel for appellee that, inasmuch as he is shown to be a citizen of this state, therefore appellant is, by reason of section 4 of the employers' liability act, debarred from claiming that, under the facts disclosed by the complaint, no right of action or liability existed against it under the laws of the state of Illinois. This section reads as follows: "In case any railroad corporation which owns or operates a line extending into or through the state of Indiana, and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have

been injured as a defense to the action brought in this state." Whatever the purpose of the legislature in the enactment of this section may have been, it is manifest that it cannot be invoked to give appellee a right of action against appellant for an injury sustained by him in the state of Illinois, if such right does not exist under the law of that state. Again, if appellant had a valid, existing cause of defense under the law of the state of Illinois to the action in question, which it could have asserted and proven in that state had the action been prosecuted therein, certainly then it is beyond the power of the legislature by the section in controversy to destroy such vested right by depriving appellant of asserting the same when sued in the state of Indiana. Such an act of the legislature would evidently operate as an unconstitutional confiscation of property rights. See section 21 of our bill of rights; articles 5 and 14 of the amendments to the constitution of the United States; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. The law recognizes that a vested right of defense to an action is, in a sense, property,—as much so as is a vested right of action,—and is equally protected as is the latter against an attempt of the legislature to destroy or take it away. The doctrine in respect to the vested right of defense is stated in *Cooley on Torts*, at top of page 552, as follows: "But it is agreed that to support an action the act must have been wrongful or punishable where it took place, and that whatever would have been a good defense to the action if brought there must be a good defense anywhere." The same author, in his work on *Constitutional Limitations*, at page 443, says: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference." In *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104, the court asserts the proposition that a vested cause of defense is as equally protected from being cut off or destroyed by an act of the legislature as is a vested cause of action. The court in that case, on page 141, 106 U. S., and page 108, 1 Sup. Ct., 27 L. Ed. 104, said: "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights." It surely cannot, in reason, be insisted that the section in question, so far as it precludes a railroad company, when sued as is appellant, under the circumstances in this case, from asserting and exhibiting its right to a valid, existing defense, may be justified or upheld on the ground that its provisions should be regarded as regulating the procedure or practice on the part of a defendant railroad company in cases of this

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character. But the legislature, in regulating the practice and procedure in courts of justice, cannot thereby wholly preclude a defendant from asserting and proving a right of defense to an action instituted against him. In Cooley, Const. Lim. (6th Ed.), on page 452, that eminent author, in treating the subject of the alteration of the rules of evidence, says: "But there are fixed bounds to the power of the legislature over this subject, which cannot be exceeded. * * * It has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. * * * It would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs." The rule is well settled that the legislative department is not authorized to declare that certain facts or evidence shall create a conclusive presumption, and thereby override the essential facts in the case, or preclude a party in an action from asserting and proving the truth. *Wantlan v. White*, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46; *Heagy v. State*, 85 Ind. 260; *John v. State*, 104 Ind. 557, 4 N. E. 153; *Board of Com'rs of Howard Co. v. State*, 120 Ind. 282, 22 N. E. 255; *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179. In the latter case this court, on page 79, 147 Ind., and page 146, 46 N. E., 36 L. R. A. 179, said: "A law which would, in effect, exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional. * * * If, however, the legislature, in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause, to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional." It must follow, then, for the reasons stated, that so far as section 4, in controversy, can be said to deprive or preclude appellant from asserting on demurrer to the complaint of appellee that the facts alleged therein do not entitle him to a recovery, or that it cuts off and deprives such railroad company from availing itself of any legitimate right or cause of defense in bar of the action existing under the laws of the state of Illinois, such legislation must be held to be an invalid exercise of legislative power.

We conclude that the complaint, for the reasons given, does not state a cause of action against appellant, and therefore the court erred in overruling the demurrer thereto, for which error the judgment below is reversed, and the cause is remanded to the lower court, with instructions to sustain the demurrer to the complaint.

CHOCTAW, O. & G. R. CO. v. MCDADDE *et al.**(Circuit Court of Appeals, Sixth Circuit, January 7, 1902.)*

[112 Fed. Rep. 888.]

Master and Servant—Safe Place to Work—Railroad Brakeman—Water Spout.*

Plaintiff's intestate, an experienced brakeman, was on a furniture car, which is longer and wider than an ordinary freight car. To signal the engineer, it was necessary to swing his lantern over the side of the car. After so signaling in discharge of his duty, his body was found 675 feet west of the water tank, on the right side of the track, near which the signal was given. There was evidence tending to show that the water spout from the water tank was unnecessarily so constructed as to project close to the track, endangering the lives of employees on the roofs of passing cars. Besides injuries likely to have resulted from a fall from a moving train, deceased was shown to have received a violent blow on the left side of the head from some blunt instrument: *held*, that a verdict based on the assumption that the water spout was the proximate cause of the fall of deceased was supported by the facts and circumstances.

Same—Evidence—Instruction.

Where the evidence in an action for the death of a railroad brakeman showed that neither necessity nor convenience required the maintenance of a water spout in dangerous proximity to passing cars, and that there was no such custom or usage on well-managed railroads as would justify such an unnecessarily dangerous projection, there was no error in an instruction stating that it is negligence, of itself, for a railroad to so construct such appliances as the one claimed to have been the cause of the brakeman's death, that they will injure brakemen at work on its trains.

Same—Abstract Principles.

Where the evidence in an action against a railroad company for the death of a brakeman justified an instruction that it was negligence, of itself, for a railroad to so construct such appliances as the one claimed to have caused the brakeman's death, that they would injure brakemen at work on its trains, there was no error in refusing instructions which dealt with the safety of appliances and places for work in the abstract.

Same—Assumption of Risk—Contributory Negligence—Questions for Jury.†

Where an experienced railroad brakeman, who had been in defendant's employ but a short time, was struck by a water spout so constructed as to project unnecessarily close to passing cars, the questions of assumption of risk and contributory negligence were for the jury.

Same—Reconstruction of Appliance—Evidence—Admissibility.

In a suit against a railroad company for the death of a brakeman, the evidence tended to show that he was struck by a water spout projecting close to the top of passing cars. Defendant gave measurements of the appliance to show that it did not, at the time of the accident, constitute a peril to men on passing cars in the proper discharge of their duty, and to show that the structure conformed to similar structures on other roads: *held*, that evidence to show what changes had occurred in the appliances by reconstruction since the night of the accident, and their effect on subsequent measurements, was admissible, under instructions restricting such evidence to showing the condition of the water spout at the time of the accident.

*As to the master's duty to furnish safe place to work, see 20 Am. & Eng. Enc. Law (2d Ed.) 55 et seq.; 5 Rap. & Mack's Dig. 39 et seq.

†See *Wood v. Louisville & N. R. Co.* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 525, and extensive note, 531 et seq.; 5 Rap. & Mack's Dig. 61 et seq.; 20 Am. & Eng. Enc. Law (2d Ed.) 62 et seq.

Error to the Circuit Court of the United States for the Western District of Tennessee.

This is an action by the widow and children of John I. McDade to recover damages for his negligent death while in the service of the plaintiff in error. There was a judgment for the plaintiffs, and the defendant has sued out this writ of error. The deceased was killed at or near Goodwin station, Ark., between 12 and 1 o'clock on the night of August 18, 1900. He was at the time in the discharge of his duty as head brakeman on top of a furniture car some 8 or 10 cars back of the engine, in a train consisting of 27 freight cars. The crew of the train consisted of the engineer, fireman, two brakemen, and the conductor. The train was west-bound. On approaching Goodwin, the engineer, when from a quarter to one-half mile east, blew for the station. The conductor, who was in the cupola of the caboose, gave with his lantern the signal to pass Goodwin without stopping. This signal was passed by the rear brakeman, then on a car about three cars ahead of the caboose, to the head brakeman, McDade, and by the latter was repeated to the engineer, who answered with a short blast. The train, in consequence, did not check, but passed Goodwin at a speed of probably 20 miles an hour. When the train reached Brinkley, 9 miles west, McDade was missed. His lantern was found on top of the car where he had last been seen, still burning, and seated in a place provided for it near the grab irons on the north side and west end of the top of the car, and within reach of the place from which the "go-ahead signal" had been repeated by the deceased. McDade's body was subsequently found on the ground, on the north side of the track, 675 feet west of the water tank at Goodwin. The evidence tended to show that it was the duty of brakemen to be on top of trains as they were approaching and passing stations, and that it was the duty of the head brakeman to watch for signals from the rear brakeman, and to repeat them to the engineer. There was evidence tending to show that, when McDade repeated the go-ahead signal on approaching Goodwin, he was seated on the top and right hand side of a furniture car, somewhat higher than the average freight car, and that he signaled the engineer over the right-hand side of the top of the train, by the proper movement of his lantern. His distance back from the engine and the engineer's position in the cab made it necessary that the signal should be repeated over the side of the car, just as this was. The evidence also tended to show that McDade, in being where he was when he repeated this signal, was just where his duty required him to be, both for observing and giving signals. There was at Goodwin, on the north side of the track, a water tank, with usual swinging spout for lowering and connecting with the tank of the engine. The contention of the defendants in error was that McDade was hit by this spout when passing the tank at Goodwin, and that he was

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rendered unconscious or dazed, and fell off the train at or near the point where his body was found, 675 feet west of this tank spout. In support of this conclusion there was evidence tending to show that this spout did not hang vertically, in reference to the tank, when not in use, but that it was constructed so close to the track, and swung at such an angle toward the track, as to endanger the lives of employees upon the top of passing cars. There was also evidence tending to show that there was no reason of necessity or convenience for so constructing or maintaining this spout, and that customarily they were so swung or suspended as to clear all trains, and all persons whose duty required them to be on the roofs of passing cars. There was also evidence tending to show that the deceased had received a violent blow from some blunt object on the left side of his head and face, and that this would be the side exposed to a collision with this spout if he remained in the position he was in when he was observed to give the go-ahead signal, just before passing this spout. There was also evidence of injuries to other parts of his head and body, likely to have resulted from a fall from the top of a train rapidly moving. There was evidence tending to show that the car from which McDade fell was a furniture car, and that it was both higher and wider than the average freight car. There was also evidence that such cars were frequently received into the trains of the plaintiff in error and of other companies. McDade was an experienced brakeman, though he had been in the service of the plaintiff in error but a short time, and had not been over the division including Goodwin more than 8 or 10 times, equally divided between day and night trips.

E. E. Wright, for plaintiff in error.

G. T. Fitzhugh, for defendants in error.

Before LURTON, Circuit Judge, and WANTY, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The whole case of the plaintiff below was founded upon the theory that the deceased had been killed by coming into collision with an overhanging water spout at the Goodwin tank. The case was put to the jury by the trial judge alone upon this theory, for the jury were told that "if he was not struck by the water spout, or the chain depending from it, in such a way as to cause his fall from the car, your verdict should be for the defendant company." While it cannot be said the evidence demonstrates that the deceased was caused to fall from his post by reason of a collision with the water spout at Goodwin, yet the facts and circumstances pointing to that conclusion were quite sufficient to justify a verdict based upon such an assumption. We have reached this conclusion from an attentive examination of the evidence, and are content to

state this result without burdening this opinion with the details, or an argument based on facts of interest only to the particular litigants here concerned. So far as the motion for an instruction to find for the plaintiff in error was based upon the supposed insufficiency of the evidence in respect to the operativeness of the water spout as a proximate factor in causing the death of the deceased, it was rightly denied.

2. In respect to the question of the negligence of the railroad company, the court instructed the jury, in regard to the maintenance of a water spout in such a situation as to be liable to strike brakemen in the discharge of their duty, that "it is negligence, of itself, for a railroad to so construct such appliances as that we have before us that they will injure the brakemen at work upon its trains." This was excepted to, and has been assigned as error. Many requests for charges involving the duty of the employer to the employee in respect to safety of appliances and places for work were also refused, not because they were not law in the abstract, but because inconsistent with the instruction in respect to the particular case which had been already given. If, upon all the facts and circumstances in evidence, the jury could not reasonably have come to any other conclusion but that it was negligent to maintain a water spout in such proximity to the track as to endanger employees whose duty required them to be on top of passing trains, the court was justified in the peremptory instruction given; and it was not error to either give the instruction we have set out, or to refuse those which dealt with the question in the abstract. Railroading is an occupation essentially dangerous, and the general principle is that railroad employees undertake all the risks of the employment which are usually incident to the occupation. But such employees do not assume the risk of the negligence of the company itself. Among the duties which devolve upon the company is that of exercising ordinary care in furnishing its employees with proper roadbed, track, and other structures and appliances upon which and with which the service required may be rendered. In the discharge of this general duty the master must not expose his servants, when in the performance of their duty, to perils or hazards against which they may be guarded by the exercise of ordinary care and diligence upon the part of the master. These principles are so well settled as to only need statement. *Railroad Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612; *Reed v. Stockmeyer*, 20 C. C. A. 383, 74 Fed. 186; *Clow & Sons v. Boltz*, 34 C. C. A. 550, 92 Fed. 572; *Felton v. Bullard*, 37 C. C. A. 1, 94 Fed. 781; *Railroad Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265.

In *Reed v. Stockmeyer*, cited above, the Seventh circuit court of appeals, speaking by Circuit Judge Jenkins, said:

"So, also, it is the duty of the master to provide a reasonably

safe place in which the servant may perform his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises, and their surroundings. There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure. In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his service without exposure to dangers that are not within the obvious scope of the employment as usually carried on."

The conclusive evidence was that such swinging spouts should be so constructed as to clear cars without endangering employees in the discharge of their duties on the roofs of passing trains. To do this it was, perhaps, not always necessary or customary that the spouts should, when not pulled down, hang in a position absolutely vertical to the tank. But on all of the evidence it was made to appear most conclusively that they should not be placed in such close proximity to the track, or hang, when not in use, at such an angle, as to endanger employees in the proper discharge of their duties on the top of passing trains. It may be that the evidence was conflicting as to whether this particular spout was a peril to brakemen on top of cars of the usual height. But it was in evidence that cars built to carry furniture are somewhat higher above the track and somewhat wider than ordinary freight cars, and that such cars were well known in the traffic, and frequently found in the trains on this railroad. The evidence clearly established that neither necessity nor convenience required that such spouts should be so constructed as to constitute a dangerous obstruction to employees on any cars known to the traffic. Judge Hammond, who tried the case in the circuit court, upon this subject summed up the law very tersely, by saying to the jury, in justification of his instruction, that:

"It is so simple a task, one so devoid of all exigencies of expense, necessity, or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakeman on the trains is a conviction of negligence."

It was the duty of the company to use ordinary care to see that the dangers incident to the employment were not unnecessarily enlarged, and the servant thereby exposed to perils which could have been guarded against by the exercise of that degree of care due to employees. The unusual and unnecessary projection of buildings, posts, cattle guards, etc., over a track, or so near as to endanger employees in the discharge

of their duties, has been generally regarded as negligence. *Dorsey v. Construction Co.*, 42 Wis. 583; *Colf v. Railroad Co.*, 87 Wis. 273, 58 N. W. 408; *Railroad Co. v. Somers*, 78 Tex. 439, 14 S. W. 779; *Railroad Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; *Scanlon v. Railroad Co.*, 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733; *Railroad Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Shear. & R. Neg.* (5th Ed.) § 201. If it had appeared that there was a uniform custom on well-managed railroads to construct such swinging water spouts in such proximity to passing cars as to endanger employees standing or sitting on the roofs of such cars while in the discharge of their duty, no legal imputation of negligence would, perhaps, arise from such a construction, however unnecessary such dangerous proximity might be. But we are not called upon to decide such a question, for the conclusive evidence in this case was that neither necessity nor convenience required the maintenance of such spouts in dangerous proximity to passing cars, and that there was no such custom or usage on well-managed railroads as would justify an unnecessarily dangerous projection of the kind in question. There was on the evidence in this case no error in instructing the jury that, if the deceased was struck by the tank spout at Goodwin while on the roof of a passing car, the fact would convict the company of negligence.

3. So far as the motion to instruct the jury to find for the defendant was based upon the assumption of the risk incident to this spout by the deceased, or upon the evidence tending to show contributory negligence, the motion was properly denied. McDade was entitled to rely upon the company's having properly constructed this spout, and the danger from the proximity of this particular spout was by no means so obvious, especially in view of McDade's short experience on this part of the road, as to charge him with having assumed the risk. The questions of assumption of risk and of contributory negligence were properly left to the jury, under a charge quite as favorable as the plaintiff in error could demand. *Railway Co. v. Keegan*, 31 C. C. A. 255, 87 Fed. 849; *Railroad Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766.

4. There was evidence admitted showing a reconstruction of this Goodwin water spout after the accident. The plaintiff in error gave evidence of certain measurements of the appliance in question made after the accident, for the purpose of showing that it did not, at the time of the accident, constitute a peril to men on passing cars in the proper discharge of their duty, and also for the purpose of showing that in its construction it conformed to similar structures on the other roads. For the purpose of showing that the structure was not in the same condition on the night of the accident as when these measurements were made, the plaintiffs were permitted to show just what changes had occurred, and their effect on subsequent measurements. The evidence was at the time

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restricted to the single purpose of arriving at the condition of the structure at the time of the accident. The jury at the time were warned to give this evidence of reconstruction no other effect. In the charge the court recurred to this evidence, and said:

"I shall not comment on the proof, because it is not necessary. But as a precautionary warning it is best to repeat what was said by the court so often during the progress of the trial,—that you must not imply anything against the defendant company by reason of the fact that after this accident they made a reconstruction of these water-tank appliances. The court kept that fact out of the proof as long as possible. But in trying to decide the conflict of testimony about the measurements by feet and inches, it became necessary to take notice of this change in order to understand the value of the proof as to measurements. The fact of the change has no other bearing on the issue of this case than that, and, for the reason so often explained to you, you should give the fact no other force than that which is necessary for the explanation of the distances."

We think there was no error.

Many errors have been assigned upon the admission of evidence. None of them are well taken. There was no error in the charge given or charges refused.

Judgment affirmed.

RIO GRANDE & E. P. RY. CO. v. LYNCH.

(*Court of Civil Appeals of Texas.*)

[66 S. W. Rep. 712.]

Master and Servant—Injury to Servant—Defective Appliances—Assumption of Risk—Evidence—Sufficiency.*

A brakeman injured by reason of cars furnished by defendant railroad company having defective drawheads and link pins testified that he had been a brakeman five or six months before the accident, and knew the kind of cars used on defendant's road, and knew that none of the link pins were of the proper kind. A witness for the brakeman testified that the latter knew the difference in height of the drawheads. There was evidence that the railroad was only 26 miles long, and only used 58 or 59 cars, and that there were only two kinds of drawheads and link pins in use, and that the brakeman had knowledge thereof: *held* to show an assumption of risk by the brakeman which would preclude a recovery.

Appeal from district court, Webb county; A. L. McLane, Judge.

Action by one Lynch against the Rio Grande & Eagle Pass Railway Company. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

Thos. W. Dodd, for appellant.

Nicholson & Mullally and Coopwood & Coopwood, for appellee.

*See 20 Am. & Eng. Enc. Law (2d Ed.) 124 et seq.; 7 Id. 1058 et seq.; 5 Rap. & Mack's Dig. 151 et seq.

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FLY, J. Appellee instituted suit against appellant to recover damages in the sum of \$20,000, alleged to have accrued by reason of the negligence of appellant in furnishing cars with defective drawheads and link pins. The cause was tried by a jury, and resulted in a verdict and judgment for appellee in the sum of \$2,000.

It is insisted by appellant that the testimony does not sustain the verdict and judgment, "because it affirmatively appears from the evidence, and especially from the testimony of plaintiff, that he was a skilled brakeman, and that he knew of the inequality in the height of the drawheads and the difference in the lengths of the coupling links on defendant's road, and with full knowledge thereof he continued, without objection or protest, to use the same, thereby assuming the risks incident to such conditions." The assignment is sustained by the record. Appellee testified: "I was a skillful brakeman, and always did my work well. * * * I had been working for defendant as a brakeman five or six months before the injury, and was familiar with the kind of cars in use on their road. We got that car at Cannell, where we had placed it before. * * * I had often coupled the caboose to other cars." Another witness for appellee testified that Lynch knew about the difference in the height of the drawheads. Appellee testified that he knew that none of the link pins used by appellant were of the proper kind. It was in proof that the railroad was only 26 miles long, and had only 58 or 59 cars in use, and that there were only two kinds of drawheads and link pins in use, and that appellee was fully acquainted with these facts.

We are of the opinion that the whole evidence tends to show that appellee knew of the defects causing the accident, and had assumed the risk arising from the use of the cars and link pins; and the judgment is therefore reversed, and the cause remanded.

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(Supreme Court of Minnesota, Feb. 21, 1902.)

[89 N. W. Rep. 68.]

Fellow-Servant Rule—Employers' Liability Applicable in Actions for Injuries to Employees of Private Railroad.

Defendant is a corporation organized for the purpose of manufacturing and dealing in lumber; buying, improving, selling, and dealing in real and personal property connected with its lumbering business; and, in addition thereto and in connection therewith, it owns and operates what is called a "logging railroad," which is equipped with four locomotives and a number of logging and box cars, used in carrying logs from the pineries to the sawmills owned and operated by it. It does not follow the business of a common carrier of passengers and freight, the operation of the road being limited exclusively to its own private business; but its servants and employees engaged in the operation of its trains are exposed to the same dangers and risks as are employees and servants of railroad corporations engaged as common carriers: *held*,

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that Gen. St. 1894, § 2701, known as the "Fellow Servant Act," applies to defendant, and it is liable to an employee engaged in the operation of such railroad for injuries caused by the negligence of a co-employee or fellow servant.

Injury to Employee Coupling Cars—Evidence—Customs.

In this action (one to recover damages for personal injuries received by a brakeman in coupling cars on defendant's said railroad) the evidence received on the trial tended to show that there was a general custom in respect to the operation of the road for the engineer, when cars being coupled came together, to immediately stop his engine and hold it stationary until signaled to again move it by the brakeman making the coupling. It further tended to show that, on the occasion complained of, this custom was not observed by defendant's engineer, in consequence of which plaintiff was injured. It is *held* that the evidence was sufficient to require the submission of the case to the jury, and to sustain their verdict to the effect that such custom existed, and that the engineer's failure to follow and observe it at the time complained of was the proximate cause of plaintiff's injury.

Case at Bar.*

Evidence examined and considered, and *held* to sustain the verdict of the jury to the effect that plaintiff was not guilty of contributory negligence, and did not assume the risks incident to making the coupling in question; also to sustain the verdict that plaintiff's cause of action was not settled and adjusted by an agreement between the parties made and entered into prior to the commencement of the action.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; C. B. Elliott, Judge.

Action by Jacob Schus against the Powers-Simpson Company. Verdict for plaintiff. From an order denying a motion for judgment notwithstanding the verdict, or for a new trial, defendant appeals. Affirmed.

Woods, Kingman & Wallace, for appellant.

F. D. Larrabee, for respondent.

BROWN, J. This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appeals from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial. The facts are as follows: Defendant is a corporation organized for the purpose of buying and selling timber land; cutting, hauling, and driving logs and timber; buying, improving, selling, and dealing in real and personal property; and the carrying on of such other business as is conveniently and necessarily connected therewith. In addition to its lumbering business, and in connection therewith, it owns and operates what is called a "logging railroad." Its line extends into the pine woods from Hibbing, in St. Louis county, the distance of about 29 miles, including spur tracks and branches. It is equipped with four locomotives and a number of logging and freight cars, which are used in carrying logs from the pineries to the sawmills owned and operated by it. It does not fol-

*As to what risks are assumed by car couplers, see 7 Am. & Eng. Enc. Law (2d Ed.) 1057 et seq.

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low the business of a common carrier of passengers or freight, the operation of its road being limited exclusively to its own business. At the time complained of, plaintiff was in the employ of the defendant upon this railroad as a brakeman, and was injured while coupling cars. The facts with respect to his injury, the manner in which it was received, and the evidence tending to show negligence on the part of defendant, will be stated further on in this opinion. Four principal questions are presented for our consideration: (1) Whether defendant is a railroad corporation, within the meaning, or comes within the operation, of chapter 13, Laws 1887 (Gen. St. 1894, § 2701) known as the "Fellow Servant Act"; (2) whether the evidence establishes negligence on the part of defendant, which was the proximate cause of plaintiff's injury; (3) whether plaintiff was guilty of contributory negligence; and (4) whether his cause of action for damages was settled and adjusted, and defendant released and discharged therefrom, by an agreement made and entered into between the parties prior to the commencement of the action.

1. It is contended that defendant is not a railroad corporation, within the intent and meaning of chapter 13, supra, and that in consequence it is not liable to one of its servants for injuries caused by the negligence and carelessness of a fellow servant. It is urged that the statute does not apply to defendant, for the reason that it was not organized as a railroad corporation, and for the further reason that it is not engaged as a common carrier of passengers and freight; its railroad business being confined exclusively to its own private affairs. The statute provides, generally, that every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by an agent or servant thereof by reason of the negligence of another agent or servant; but railroads under construction and not open to public use are excepted from the operation of the act. The statute has been before the court repeatedly with respect to its validity and its application to particular servants and employees, and has been sustained, not as a law applying exclusively to railroad corporations as a class,—for, if that were its purpose, it would, as intimated by Judge Mitchell in *Johnson v. Railroad Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, be unconstitutional and void as class legislation,—but as applying to employers whose servants and employees are exposed to the peculiar hazards and dangers incident to the operation of railroads. In that case the court said: "If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions." Within the reasoning of that decision, and other cases in this court (*Smith v. Railroad Co.*, 44 Minn. 17,

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46 N. W. 149; *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. 974; *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260), the test in interpreting and construing this statute is not whether the corporation engaged in operating the railroad was organized as a railroad corporation, but whether the road being operated is a railroad, within the ordinary meaning of the term, in and about the operation of which employees are exposed to those dangers and risks from the consequences of which the legislature intended to provide against. In *Suth. St. Const.* 218, it is said to be indispensable to a correct understanding of a statute to inquire what is the subject of it,—what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies. General words may be restricted to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention. The subject-matter of the statute under consideration, and its intent and purpose, were to protect employees engaged in a dangerous and hazardous employment; and, within the decisions cited, the character of the employer is not of controlling importance. The statute is to be given, if not a liberal, at least a reasonable, interpretation, and one that will carry into effect the intent of the legislature. If the character of the employer, within the meaning of the statute, is not important, and the nature of the employment is the test to be applied in construing the statute, the expression "any railroad corporation engaged in the operation of a railroad" should, within the rule laid down by *Sutherland*, be enlarged and expanded so as to include any person, company, or corporation engaged in operating a railroad, incident to which operation are the dangers and hazards from which the legislature intended to protect the employees. *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788. Defendant was not organized as a railroad corporation, it is true; but it is conceded that it is operating a line of railroad equipped with engines and cars, the operation of which, so far as concerns the running of its trains, is identical with ordinary railroads, except that it is in the interests of its own private affairs. Every purpose intended to be subserved by the statute applies to it. Its servants and employees in the operation of its trains are exposed to the same dangers and hazards, if not greater, as employees of ordinary railroads; and to hold that it does not come within the statute would, in our judgment, be illogical and out of harmony with the prior decisions of the court, against the manifest intent of the legislature, and a cramped and unnecessarily restricted interpretation of the law. The mere fact that it is called a "logging railroad," and came into existence since the passage of that act, is by no means decisive of the question.

It is a general rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage. *McAunich v. Railroad Co.*, 20 Iowa, 338. And within this rule, even though defendant is engaged in operating a "logging railroad" only, and exclusively in the interests of its private affairs, and though such railroads were not known at the time of the passage of the statute, and consequently not then in the contemplation of the legislature, the operation of its road, in respect to the dangers and hazards to which its employees are exposed, brings it squarely within the spirit and purpose of the law; and it must, to effectuate fully the intention of the legislature, be held to be within its scope and operation. In the case of *Mikkelson v. Truesdale*, supra, it was held that the statute applies to a receiver engaged in operating a line of railroad as the representative of the court, in the interests of bondholders and creditors. We are unable to point out any logical distinction between a receiver engaged in operating a railroad and a lumber company similarly engaged, in so far as applicable to this statute. A like conclusion was reached in *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270,—a case involving a similar statute. In *Daniels v. Hart*, 118 Mass. 543, mortgagees in possession of a railroad and operating it were held to be within the meaning of the statute. These decisions are in line with sound reasoning and the spirit and purpose of such statutes. It was held in *Funk v. Railway Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608, that the statute did not apply to street railways. But the reasons for the statute do not in any essential degree apply to such railways. Employees on such roads are not exposed to such hazards, risks, and dangers as are the employees of railroad corporations proper. The spirit and purpose of the statute must be looked to in determining its scope and application; and as the spirit and purpose of this law was the protection of employees engaged in a hazardous and dangerous work, though the literal language thereof limits its operation to railroad corporations, we hold that it applies to any corporation or person engaged in operating a line of railroad, incident to which operation are the dangers and hazards to employees the legislature intended to provide against.

2. It is contended by appellant that there is no evidence sufficient to support the finding of the jury that plaintiff's injury was caused by defendant's negligence. The accident occurred in the nighttime, when it was very dark. The employees in charge of the logging train had been engaged in hauling car loads of logs from spur tracks to the main track of defendants' road, and plaintiff was injured in coupling two of the cars. The cars so coupled by him were loaded with logs which were so placed thereon that the ends projected over the

ends of the cars to such an extent that the first effort to couple them failed, the ends of the logs coming together and preventing the coupling. The impact, however, drove the logs back on the respective cars, so that at the next attempt to couple the drawbars came together, and the coupling was made. The evidence tends to show that it was customary, in making couplings of this kind, for the engineer, when the cars being coupled came together, to stop his engine immediately, and not move it until signals were received from the persons making the coupling, and after he had come from between the cars. This custom and practice are not disputed. There is evidence, also, that the brakeman making the coupling usually signaled the engineer for the purpose of guiding the movement of the engine as it approached the car to which the coupling was to be made, and that just prior to the time the cars came together a signal would be given by the brakeman to stop the engine. No such signal was given on this occasion; but plaintiff relies for recovery, not upon a failure to obey that signal, but upon a failure on the part of the engineer to observe the usual custom in respect to stopping the engine and train at the time the coupling is made. It is not disputed in the evidence but that the engineer is able to tell from the jar of the train when the cars come together, and, in view of the fact that it appears from his testimony that when they came together on this occasion he did immediately stop his engine, it is not important that the usual signal to stop was not given. The custom being established, it is clear that plaintiff had the right to rely upon its observance, and the failure on the part of the engineer to do so was negligence. *Romick v. Railroad Co. (Iowa) 17 N. W. 458; Hooper v. Railway Co., 80 Minn. 400, 83 N. W. 440.* Besides, it is not claimed that the failure to give the stop signal was the cause of the continued movement of the train after the coupling was made; but it is insisted by appellant that the engine was in fact stopped, and did not move a greater distance than two or three feet. It is contended by plaintiff that at the time he entered between the cars to make the coupling, instead of observing the usual custom and rule as to stopping the engine when the coupling is made, the engineer continued to move and push the cars forward, in consequence of which plaintiff was injured. Because of the fact that the logs extended over the ends of the cars so being coupled, plaintiff could not enter between them in an erect position, but was compelled to do so in a stooping position. To make the coupling was a dangerous undertaking. He knew of the situation and the manner he would be required to go between the cars, and before doing so he called the engineer's attention to the fact, and requested him to move his engine back carefully, so as to avoid any danger. As stated, the specific charge of negligence is that the engineer failed to observe the usual custom in respect to stopping the engine at the time the

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coupling was made. On this theory the case was sent to the jury. The evidence on the part of defendant tends to show not only that no signal was given to the engineer to stop his engine at the time plaintiff entered between the cars to make the coupling, but that the engineer did in fact stop it, by shutting off steam and reversing the machinery. It is claimed that the evidence is conclusive that the engineer exercised care and prudence, and was guilty of no failure or neglect in the respects contended for by plaintiff. If this were true, defendant should have judgment; but a careful examination of the evidence satisfies us that a case was fairly made for the jury, and their verdict in plaintiff's favor cannot be disturbed. Plaintiff's evidence to the effect that the engineer did not stop the engine and cars at the time the coupling was made is corroborated by undisputed evidence tending to show that fact. It appears that there were not more than four cars attached to the engine at the time the coupling was made, and five after it was made. It further appears that, just before making this coupling, plaintiff and his fellow brakeman blocked the wheels of the fifth car with a large stick of timber or wood, about six inches in thickness; the testimony is (and we find nothing in the record to dispute it) that, after the coupling had been made, the fifth car, to use the language of the witness, "passed clear over the blocks." It is the claim of plaintiff that the train proceeded a distance of a car length and a half after the coupling was made. If defendant's testimony that the engineer did in fact bring the engine and cars to a standstill at the time the coupling was made be true, it is not very clear how the fifth car could have passed over the blocking. The fact that it did tends to show, and to corroborate plaintiff's assertion, that the engine was not stopped. Again, plaintiff was picked up after his injury at the side of the track, about the center of the third car from the engine, and he testified that the coupling was made between the fourth and fifth cars. It is not seriously controverted that plaintiff was found near the track at about the center of the third car, though it is claimed by defendant that the coupling was made between the third and fourth. If plaintiff's testimony that the coupling was made between the fourth and fifth cars is true, the fact that he was found immediately after the accident at about the center of the third car tends to corroborate his claim that the engine was not stopped when the coupling was made, but continued to move forward the distance of a car or more. The truthfulness of the several witnesses was for the jury to determine, and we are unable to see our way clear to declare, as a matter of law, that the evidence is conclusive against the contention that the engineer was negligent.

3. It is claimed that plaintiff was guilty of contributory negligence, and that he assumed the risks incident to making the coupling in question. It is true, as a general rule, that, if a person by his own carelessness contributes to his injury,

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he cannot recover. It is also true that a railroad employee assumes all the ordinary risks and dangers of his employment; but this assumption of risks extends only to such as are, in point of fact, ordinary risks of the employment. He does not assume risks and dangers resulting from the negligence of his fellow servants. The question of plaintiff's contributory negligence is disposed of, we think, by the decision in *Corbin v. Railroad Co.*, 64 Minn. 185, 66 N. W. 271,—a very similar case. There the car was loaded with iron rails, and, as here, they projected over the end of the car; and, in order to make the coupling, it was necessary that the brakeman stoop over in going between the cars for that purpose. He knew the situation, and the condition in which the cars were loaded; and the court held that he was not guilty of contributory negligence, as a matter of law, but that the question was one of fact for the jury to determine. That case is on all fours with the case at bar, so far as this question is concerned, and is decisive and controlling.

4. About a month after plaintiff received his injury, and while he was still at the hospital, an agent of defendant called upon him and paid him the sum of \$75, obtaining therefor a written release of defendant of all claims for damages arising in plaintiff's favor by reason of this accident. It is claimed by defendant that this payment was made and accepted in full settlement of plaintiff's claim, that an agreement to that effect was entered into by plaintiff understandingly, and that he was fully apprised of the contents of the written release before it was signed by him. Plaintiff claims that the payment to him was stated at the time to be a donation by defendant; that nothing was said to him about the settlement of his claim for damages; that his signature to the written release was obtained by the fraudulent representations of defendant's agent; that he cannot read the English language, and did not read the paper or release signed by him, but relied wholly upon the statements of defendant's agent as to its contents. A similar situation was presented in the case of *Christianson v. Railway Co.*, 67 Minn. 94, 69 N. W. 640. It was there held, upon evidence similar to that presented in the record in this case, that the question whether the money was paid in satisfaction of plaintiff's damages, and whether the release was signed for the purpose of discharging the railroad company from liability, or whether it was procured by fraud on the part of the company's agent, were questions for the jury to determine. The verdict in that case was to the effect that the release was obtained by fraud, and this court sustained it. We discover no reason, after a careful reading of the evidence, for disturbing the finding of the jury in this case, though there are some items of evidence which tend strongly to corroborate defendant's contention, but it is by no means conclusive in its favor. *Mullen v. Railroad Co.*, 127 Mass. 86, 34 Am. Rep. 349. There are circumstances, too, tending to corroborate plaintiff's

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contention that the money was paid as a donation. If defendant did not deem itself liable to plaintiff on account of his injuries, no reason is apparent why it should donate to him any sum whatever; and, on the other hand, if, in its opinion, a liability in fact existed, and one which, in justice, it ought to settle, it is fair to assume, as the jury probably did, taking into consideration the nature and extent of plaintiff's injuries, that it would have offered him considerably more than the very nominal sum of \$75.

Our conclusion is that the verdict of the jury must be sustained. Order affirmed.

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(*Supreme Court of Nebraska, Dec. 18, 1901.*)

[88 N. W. Rep. 508.]

Right of Railroad to Protect Itself from Flow of Surface Water.

A railroad company may, like any other proprietor, protect itself from the flow of ordinary surface water, and will not be liable to an adjoining owner for so doing. *Morrissey v. Railroad Co.*, 56 N. W. 946, 38 Neb. 406.

Same—Liability for Injury to Adjoining Land.*

Where, however, a large territory is drained by a ravine or draw, through which the surface water of such territory flows in times of flood or melting snows in such quantities as to cut a channel, a railway company should, in constructing its roadbed across such draw, provide for the discharge of such water as naturally flows therein; and if its roadbed is so constructed as to dam the water and flow it back over the premises of an adjoining proprietor, or to discharge the accumulated water in unusual quantities upon the land of those adjoining, it will be liable for the damages occasioned thereby. *Railroad Co. v. Sutherland*, 62 N. W. 859, 44 Neb. 526; *Town v. Railroad Co.*, 70 N. W. 402, 50 Neb. 768.

Act of God—Pleading.

The act of God, when relied on as a defense, must be specially pleaded.

Pleading—Amendments.

It is usually a matter within the discretion of the trial court to allow or refuse to allow a pleading to be amended to conform to the evidence given on the trial.

Instructions.

Instructions examined, and found to state the law correctly.
(Syllabus by the Court.)

Commissioners' decision. Department 3. Error to district court, Jefferson county; Letton, Judge.

Action by Ruth A. Shaw against the Chicago, Rock Island & Pacific Railroad Company for damages sustained from surface water. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

M. A. Low, W. F. Evans, L. W. Billingsley, and R. J. Greene, for plaintiff in error.

A. H. Babcock, for defendant in error.

*See note, 14 Am. & Eng. R. Cas., N. S., 840 et seq.

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DUFFIE, C. The defendant in error is the owner of the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 31 in township 4 of range 4 E., in Jefferson county, Neb. In 1892 the plaintiff in error constructed its road through Jefferson county, passing in a southwesterly direction over a part of the land of the defendant in error; entering on the same about 1,100 feet north of the southeast corner thereof, and leaving it about 800 feet west of the southeast corner. A draw runs through this land in a southeasterly direction, which drains a large body of country, estimated by the witnesses at from 1,500 to 1,800 acres. This draw carries a large volume of water during and for some time after a period of heavy rains or melting snow, and it is described by most of the witnesses as having well-defined banks for at least a portion of its length; and it flows into Cub creek about 50 yards from the point where it leaves the plaintiff's land. When the railroad company constructed its roadbed over plaintiff's premises, a dirt embankment was thrown up across this draw; provision being made for the escape of water running therein by placing a pipe 36 inches in diameter under the embankment, at or near the channel. Up to the year 1896 this pipe was apparently sufficient for the flowage of water running in the channel, but on June 6, 1896, a heavy rain precipitated a large volume of water into the draw, and, the pipe proving insufficient to allow its discharge, the water forced its way through the embankment, washing away a considerable portion thereof; and a 16-foot bridge was built in the opening thus made, and the pipe removed. This is the first flood for which damage is claimed. Other freshets occurring at subsequent dates washed away other portions of the embankment, and the bridge was enlarged until it is now 60 feet in length. This bridge, the plaintiff alleges, was not built over the channel formed by the running waters of the ravine, but some four rods north thereof, and on ground much higher than was the channel in which the water had been accustomed to run, the channel itself being obstructed by a solid earth embankment; and on three occasions, viz. June 6, 1896, June 30, 1896, and April 23, 1897, the flowing water was diverted from its accustomed channel and impeded and obstructed in its passage by the roadbed of the company so negligently, wrongfully, and improperly constructed, and caused to dam up and accumulate in large quantities against and alongside of said roadbed and embankment, on the upper side thereof, and to back up and flood over a large tract of plaintiff's land on the west side of said embankment, destroying her crops growing thereon; that finally the great pressure of water thus accumulated on the west side of said embankment broke through the same, and the pent-up waters in large volume and with great force rushed over and flooded a large part of her land on the southeast corner of her 80-acre tract, and on the east side of the roadbed, carrying with it sand, dirt, and flood trash, and depositing the same on various parts

of her premises, and injuring her buildings and improvements which are located on the east side of the roadbed. The plaintiff's petition is in three counts,—the first claiming compensation for the damage for the overflow of June 6, 1896; second, for that of June 30, 1896; and the third, for that of April 23, 1897. The answer, in addition to a general denial, alleged that the railway was constructed, operated, and maintained over the premises of the plaintiff, and at all other places, in a proper and lawful manner. A trial resulted in a verdict for the plaintiff, and from a judgment entered thereon the railroad company has taken error to this court.

The first assignment discussed by the plaintiff in error is instruction No. 13 given by the court, which is as follows: "The plaintiff sues upon three counts,—damages for the flood occurring June 6, 1896, for the flood occurring June 30, 1896, and for the flood occurring April 23, 1897. You will estimate the damages, if any, occurring at each time of the flood separately; and if you find defendant liable for the damages caused by any one flood, and not for the others, you will confine the amount you find to the damages suffered at such time, but will bring in your verdict for the total amount of damages for which defendant is liable. If you find the defendant railroad company was not negligent in the premises, you will find for the defendant." It is urged that there was no evidence whatever tending to show that the damage suffered by the plaintiff below from the storm of April 23, 1897, was caused by the railroad company, or by the manner in which the railroad was constructed or maintained. While the direct evidence is not as clear as it might have been upon this question, we are not prepared to say, considering all the circumstances of the case, that the court would be warranted in taking from the jury, or refusing to submit to the jury, the defendant's liability for the damages caused by the April flood. We think that there was evidence sufficient to go to the jury under the carefully prepared instruction of the court, and to uphold a finding that the damages were caused by the defendant's negligence in the construction of its roadbed.

The next assignment of error discussed in plaintiff's brief is the eighth instruction, as follows: "If you believe, however, that on said June 30, 1896, the said embankment and the opening therein were so constructed as not to allow the discharge of the surface waters ordinarily flowing down, or which might reasonably be expected to flow down, said channel, and that by reason of such faulty construction the plaintiff was damaged by said surface waters, then the plaintiff would be entitled to recover upon the second cause of action for damages caused by said flood of June 30th." As the material question in this case is the negligence of the company in not providing a sufficient opening in its embankment for the discharge of the surface water accumulating in the ravine or draw under the circumstances shown by the evidence in this case, we think it

proper to state the objections taken to this instruction in the language used by the plaintiff in error in its brief, as follows: "This was clearly erroneous, as it assumed, as a matter of law, that, if 'said embankment and the opening therein were so constructed as not to allow the discharge of the surface waters,' the railway company was guilty of negligence. In other words, the court told the jury by this instruction that, if the railway was 'so constructed as not to allow the discharge of surface water,' that, as a matter of law, was a 'faulty construction,' and the plaintiff below was entitled to recover all damages caused thereby. The following language of this court is especially applicable to this: 'A railroad company, in the absence of evidence to the contrary, must be presumed to have constructed its embankment in a proper manner for the operation of its line of railway. If, in doing so, surface water was deflected from its source so as to be thrown * * * over the land of the plaintiff, no right of action thereby accrues to the plaintiff.' *Morrissey v. Railroad Co.*, 38 Neb. 406, 56 N. W. 946. In that case the evidence showed that the railroad was constructed and maintained upon an embankment in such a manner as to cause the surface water to back up and flow over the plaintiff's land, but this court held that 'it is proper to presume, in the absence of proof on the subject, that said embankment was, for railway purposes, properly constructed.' In a later case this court said: 'This question was carefully considered in the case of *Morrissey v. Railroad Co.*, 38 Neb. 406, 56 N. W. 946, and the conclusion therein announced that the rule of the common law prevails in this country. Subject to that rule, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose; and, unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter, to his damage.' *Brewing Association v. Peterson*, 41 Neb. 897, 60 N. W. 373."

We have given the argument and the citation of authorities in support thereof made by the plaintiff in error in order that its contention may be fully understood. If we understand the argument, it is to the effect that the common-law rule in relation to surface water is in force in this state, and that a railroad company, in common with other proprietors of land, may claim the benefit of that rule. At common law the proprietor has a right to protect his real estate against surface water. In doing so he may turn the water on the servient or lower land without liability to damage. Mere surface water—that which does not run in any confined course or channel—is regarded as a common enemy, against which any landowner affected by it may fight. This rule was recognized and enforced in *Morrissey v. Railroad Co.*, *supra*, and it was the only question discussed or decided in the case. There was no

question in that case, as we understand it, that the railroad company had negligently constructed its embankment so as to collect the surface water and flood it back on the land of another, or, after confining it, allowing it to break away and flood the servient estate. It was a mere question of whether, by the erecting of an embankment which diverted the course of surface water upon the lands of another, the company was liable, and it was held that it was not liable. In the present case the question of negligent construction is added as another element to be considered. At common law one could not negligently improve his property to the detriment of another. This is recognized in *Brewing Association v. Peterson*, supra, quoted by the plaintiff in error, and it is there said: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage. But if, in the execution of said enterprise, he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." No one has the right to collect surface water upon his premises and flood it back upon his neighbor, or, after being collected in large quantities, to discharge it upon the adjoining estate to the injury of the latter. He may dike against its flow upon his own premises. He may use such reasonable means as are necessary to retain it upon his premises, if he so desires; but he cannot use his own premises to accumulate it in large quantities, and then flow it down upon his neighbor, causing to the latter damage and injury. We think that this principle has been fully recognized and enforced in *Railroad Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859, and *Town v. Railroad Co.*, 50 Neb. 768, 70 N. W. 402. In the first case cited it is said: "The doctrine of this court is the rule of the common law,—that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. But this rule is a general one, and subject to another common-law rule,—that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. Therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause surface water to flow onto the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." In *Town v. Railroad Co.* it is said: "Surface waters may have such an accustomed flow as to have

formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a water course; and though there are no exceptions to the general rule, except from necessity, this may constitute an exception, and, if the flow is stopped by the erection of an embankment across and in the channel, some provisions may be necessary for the allowance of the regular flow of the surface waters. Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters, and whether such negligence, if any, is the proximate cause of an alleged injury, are generally questions to be submitted to the jury." We think that the case last cited from is decisive of the one at bar, and we fully agree with the reasoning of that case. It would be an unfortunate rule of law which would allow a railroad company, or any other proprietor of land, to erect an embankment across a ravine in which a large body of water is accustomed to run during the rainy season or upon the melting of snow, without making the necessary provision for its flow in the usual manner. In the present case there was a ravine of some miles in length, down which the water poured in large quantities at certain seasons. It was fed by other like draws and streams. The fact that it cut its way through the solid embankment on different occasions is evidence sufficient to show the volume and force of the water which it carried. It might, almost as a matter of law, be said to be negligence to throw an embankment across a ravine without providing adequate means for the flow of the water, and it certainly ought not to be contended that the finding of the jury that such an act was negligence ought to be disturbed by the court. We regard it as now settled by the former decisions of this court that a railway company, or other proprietor of land, cannot throw an embankment across a ravine or draw, into and through which the surface water of a large scope of country is accustomed to flow, without providing adequate means for the usual flowage of the water naturally seeking an outlet. We think the court was fully justified in giving its eighth instruction by the cases above quoted, and that error cannot be predicated thereon.

Complaint is made of the concluding paragraph of the sixth instruction of the court. Taking that part of the instruction alone, it would probably be incorrect and misleading, as the jury was told that the company was liable for not providing for the deposition of surface water which might injure the plaintiff. As we have seen, and as was held in *Morrissey v. Railroad Co.*, *supra*, the company was under no obligation to guard against the flow of surface water upon the premises of the plaintiff under ordinary circumstances, and where the conformation of the surrounding country did not force the water toward a common point of final drainage, and through which it had run until a channel has been formed through

which it seeks its natural outlet. The surroundings here were, however, of an exceptional character, and almost identical with those set out in *Railroad Co. v. Sutherland*, supra; and the court, evidently with that case in mind, called the attention of the jury, in another part of the sixth instruction, to the state of facts which the evidence tended to establish, and made it clear that it was only to the exceptional circumstances of the case that the instruction was applicable. That there may be no misapprehension of our meaning, we quote so much of the sixth instruction as precedes the phrase complained of: "The question whether or not the defendant railroad company was negligent in the construction of its embankment across the ravine or draw which traversed the plaintiff's land is a question which you must determine from all the facts and circumstances in evidence before you, and, in passing upon this question, you should take into consideration the length of the ravine or draw, the area of land which it and its branches and feeders drained above the point where the railroad crossed it, the height of its banks, its width, and whether or not water flowed or stood in the same for any length of time. You should consider the configuration of the ground at the place where the railroad embankment crossed it, the height of the embankment, and all other facts which have been testified to before you which will aid in deciding upon the effect that the construction of said embankment had upon surface waters which flowed down said draw. You should also consider the testimony as to the opening made in said embankment by the railroad company prior to the 6th day of June, 1896, when the first damage is claimed to have been suffered by the plaintiff, and should also consider the means, if any, devised by the railroad company for discharging the water which flowed down said channel through said embankment into the natural channel at a lower point; and if, from all the evidence in the case, you believe that said railroad company had used at or before the 6th day of June, 1896, such precautions and means as an ordinarily prudent and reasonable person would use to guard against any damage to the plaintiff by reason of the construction of said embankment, then the defendant railroad company would not be guilty of negligence in the premises, and it would be your duty to find for the defendant in such case." The instruction, as a whole, correctly states the law as we understand it.

Complaint is further made that the court refused an instruction tendered by the plaintiff in error to the effect that if the floods, or either of them, which did the damage complained of, were unprecedented in character, and of such force and volume as to make them, or either of them, without parallel in the vicinity in which they occurred, and were such as not to be anticipated, then for the damage done by such floods the defendant would not be liable. The court, we think, correctly refused the instruction. In the first place, no defense of that

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character was tendered by the answer filed by the defendant; and, secondly, there is no evidence that the floods of June 6, 1896, and April 23, 1897, were of the character described in the instruction. There was some evidence offered by the defendant company tending to show that the storm of June 30, 1896, was unprecedented in its character and force.

We recommend the affirmance of the judgment.

ALBERT and AMES, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

MISSOURI PAC. RY. CO. v. HEMINGWAY.

(*Supreme Court of Nebraska, Jan. 8, 1902.*)

[88 N. W. Rep. 673.]

Sufficiency of Petition.

Petition examined, and *held* good as against a general demurrer.

Pleading—Argumentativeness.

The remedy for argumentativeness in a pleading is by motion, and not by demurrer.

Limitations—Accrual of Action for Injury to Land from Construction of Roadbed.

An action by a landowner for damages resulting from the negligent construction of a roadbed or embankment by a railroad company does not accrue until such landowner sustains actual injury, and is not barred until four years from the date of such injury.

Duty to Construct Roadbed So as Not to Cause Overflow.*

In the construction of a roadbed across a ravine, or other natural course of surface drainage, a railroad company is bound to provide, so far as is consistent with the safe and proper operation of its road, for the discharge of such water as naturally flows therein, and, upon failure so to do, is liable for damages occasioned by such omission.

Continuance.

A judgment will not be reversed for a denial of an application for a continuance unless it affirmatively appear that there was an abuse of discretion in denying such request.

Findings.

Where a question is submitted to the jury after a request on that behalf by a party to the suit, such party will not be heard to say that an adverse finding thereon is not sustained by sufficient evidence.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Lancaster county; Cornish, Judge.

Action by John M. Hemingway against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

B. P. Waggener, J. W. Orr, and A. R. Talbot, for plaintiff in error.

Stevens & Cochran, for defendant in error.

ALBERT, C. This action was brought for the recovery of damages resulting from the alleged wrongful construction by

*See note, 14 Am. & Eng. R. Cas., N. S., 840 et seq.

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the defendant company of an embankment across a ravine, whereby the surface water was diverted from its natural course and discharged in large quantities upon the premises of the plaintiff, inflicting the damages complained of. A trial resulted in a verdict and judgment for the plaintiff. The defendant brings the case here on error.

The defendant interposed a general demurrer, which was overruled, which ruling is now assigned as error. The petition is assailable on two grounds: First, because it shows on its face that the cause of action is barred by the statute of limitations; and, second, because it does not allege that the embankment crosses a water course or channel, nor that it was wrongfully constructed. As to the first, we think it is disposed of in *Railroad Co. v. Standen*, 22 Neb. 343, 35 N. W. 183, wherein it is held, in effect, that where a railway bridge is so negligently constructed as to form an unlawful obstruction, and becomes a nuisance by crossing an overflow of water, no right of action accrues to a landowner until he sustains an actual injury caused by such obstruction, as by the overflow of his lands. The case of *Same v. Moschel*, 38 Neb. 281, 56 N. W. 875, cited by defendant, is not in point. There the damages sought to be recovered were such as resulted from the proper construction and operation of the road, and would have been a proper subject of inquiry in condemnation proceedings. But the damages in this case are such as resulted from the improper construction and operation of the road, and could not have been taken into account in the proceedings for the condemnation of the property. To hold that such damages should be taken into account in such proceedings would render the construction of railroads a most hazardous enterprise. As to the second ground, it appears from the petition that the embankment was built across a ravine, which was a part of the natural system of drainage of surface water; that no bridge, culvert, or opening of sufficient size was placed therein to permit the surface water collecting in such ravine to pass through unobstructed; that, in consequence of such omission, plaintiff's premises were flooded, and the damages complained of sustained. We think this is sufficient, under the circumstances, to show that the embankment was improperly constructed. While the pleading is to some extent argumentative, yet the facts thus pleaded, when confessed by demurrer, may not be ignored. The remedy for argumentative pleading is by motion, and not by demurrer. In our opinion, the petition is good as against a general demurrer.

2. It is next urged that the court erred in refusing to give at defendant's request the following instructions: "(1) The jury are instructed that in Nebraska the common-law rule prevails touching the damages occasioned by surface water, such as are sought to be recovered in this action, and you are instructed, under the common law, which prevails in Nebraska, that surface water is a common enemy, and that the owner

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may defend his premises by dike or embankment, and, if damages result to adjoining property by reason of said defense, he is not liable therefor. Under this rule, such water may be controlled by the owner of the land on which it falls or over which it flows. He may appropriate to his own use all that flows or comes on his land, and refuse to receive any that flows on or comes on his neighbor's land; and you are further instructed that under this rule the defendant railroad company stands in the same position that any individual would stand in like circumstances, so that the rule just announced applies to the railroad company in this case. (2) The jury are instructed that it is important in this case to determine what is a stream or water course; and you are instructed that, to constitute a water course, the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry, but it must flow in a definite channel, have a bed, sides, or banks, and usually discharge itself in some other stream or body of water. It must be something more than a mere surface drainage over the entire surface of a tract of land, caused or occasioned by freshets or other extraordinary causes. It does not include water flowing in hollow ravines in land, which is mere surface water from rains or melting snow, or is discharged therethrough from a higher to a lower level, which at other times are destitute of water." These instructions were properly refused. They do not state the law applicable to the facts in this case. See *Railroad Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859; *Town v. Railroad Co.*, 50 Neb. 768, 70 N. W. 402; *Railroad Co. v. Shaw* (Neb.; Sept. term, 1901) 88 N. W. 508. In the last case Commissioner Duffie reviews the authorities at length, and deduces the rule that "a railroad can and should, in constructing its roadbed across such draw [ravine], provide for the discharge of such water as naturally flows therein; and if its roadbed is so constructed as to dam the water and flow it back on the premises of an adjoining proprietor, or to discharge the accumulated water in unusual quantities onto the lands of those adjoining, it will be liable for the damages occasioned thereby." If that be the correct rule of law,—and we do not doubt it,—to have given the instruction asked would have been error.

Complaint is made of the admission of certain evidence, which complaint is formed in these words: "This line of testimony was erroneously admitted by the court, because under the pleadings the railroad company was charged with stopping the flow of water that came in a southeasterly direction from the barn. We contend—First, that under the pleadings no testimony could be admitted showing that the water

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came from the northeasterly direction when we were charged from stopping the water that came from the southeasterly direction; and, second, we contend that it was error to admit this testimony showing that the water came from a north and northeasterly direction through ditches along by the highway to the point on the railway company's embankment just opposite the barn in question, which accumulation of water at this point was made because of the ditches in the public highway. We contend that the diversion of the surface water by means of the ditches along the public highway, and throwing off of the same upon the right of way of the railway company, was a condition over which the railway company had no control, and could not have, at the time of the construction of the embankment, years prior." In the first place, the petition was amended to change the allegation as to the direction from which the water came. Besides, in cases like this, where it is necessary to describe the lay of the land, in order that the jury may understand the topography of the country and the effect of the embankment on the surface drainage, there is bound to be more or less evidence that does not bear directly on the issues. The jury were instructed that the defendant would not be liable if the change in the flow of water was caused by the ditches along the public road. Under such circumstances, there was no error in receiving such evidence.

Complaint is made of the admission of certain expert testimony as to the value of some of the property alleged to have been injured by the water; but no complaint is made on that ground in the petition in error, unless it be under the general assignment of errors of law occurring during the trial; but such assignment, under the repeated holdings of this court, is too general to receive attention.

It is urged, further, that the court erred in permitting the amendment of the petition as to the direction of the flow of water, and in denying the defendant's request for a continuance to enable it to meet the proof in support of such amendment. Such matters are largely within the discretion of the trial court. Our attention has not been directed to any showing made by the defendant that a continuance was necessary to enable it to meet such evidence, nor have we been able to find any record of such showing. Hence we cannot say there was an abuse of discretion by the trial court in this behalf.

The defendant insists that the damages sought to be recovered are too remote. The damage claimed is for injuries to certain animals, resulting from their standing in water of considerable depth which flooded the stable. It is claimed that they were rendered thereby less valuable for breeding purposes, which appears to have been the purpose for which they were kept. We cannot see that any such damages are any more remote than injuries that would have rendered them less valuable for any other purpose. Had the damage been

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to lumber or to any kind of personal property, the ultimate question would have been precisely the same as that presented in this case; nor would injuries whereby such property had been rendered less valuable for the purposes for which it was intended be regarded as too remote or as speculative.

It is urged further that the verdict is not sustained by sufficient evidence. Our attention is specifically directed to the evidence on the point whether the embankment was constructed properly and with due care. That question was submitted to the jury after an instruction on the same point had been tendered by the defendant. It is a well-settled rule of this court that a party who asks the submission of a question to a jury will not be heard to say that an adverse finding thereon is not sustained by sufficient evidence. Besides, in our opinion, it cannot be fairly said that the verdict is not sustained by sufficient evidence.

We recommend that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

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(*Supreme Court of Alabama, Nov. 27, 1901.*)

[31 So. Rep. 33.]

Care Required in Construction of Bridge to Prevent Injury to Land from Overflow.*

In the location and construction of bridges and trestles, a railroad company is required to bring to the work the engineering skill and knowledge generally known and applied in business, having regard to the size and nature of the stream, the character and features of the adjacent country which constitutes its watershed, the relative position and formation of the abutting land, its liability to overflows, and their probable extent and effect; but is not bound to provide against unusual or extraordinary floods, such as have never been known to occur before, and which could not reasonably have been anticipated by competent and skillful engineers.

Instructions—Not Warranted by Evidence.

In an action against a railroad company to recover damages resulting from an overflow, alleged to have been caused by the negligence of the defendant in failing to leave a sufficient opening in a trestle for the passage of the waters of a creek in times of flood, where the evidence tends to show that the overflow was caused by an unusual rainfall, which washed logs and timbers and debris against the trestle, a charge is properly refused which instructs the jury that if they "believe from the evidence that there had been rains of as great magnitude before, and that the overflow, in this instance, was caused by the choking up of the water way under the trestle by timbers,

*As to the liability for injuries to riparian owners caused by the construction and maintenance of bridges over unnavigable water-courses, see 28 Am. & Eng. Enc. Law 966 et seq.; 8 Rap. & Mack's Dig. 172 et seq.

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brush, and other debris, which were not left lying in the path of the stream by the negligence of the defendant, they must find for the defendant."

Same--Same.

In such a case, a charge is properly refused which instructs the jury that if they "believe from the evidence that there had been rains of as great magnitude before, and that the overflow was caused, in this instance, by the choking of the water way under the trestle by timbers, brush, and other debris, which were not left lying in the path of the stream by the negligence of the defendant, they cannot find for the plaintiff."

Evidence—Washing Away of Track at Other Points.

In an action against a railroad company to recover damages resulting from an overflow, alleged to have been caused by the defective construction of an embankment over a creek, where the evidence shows that the tracks of the defendant were washed away upon the occasion in question, at the place where the injuries were caused, it is not competent for the defendant to prove that there were other points along the line of its road in the same county that were damaged by reason of the same heavy rainfall.

Appeal from circuit court, Lamar county; S. H. Sprott, Judge.

Action by W. H. Plott against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This action was brought to recover damages for injuries to a stock of goods owned by the plaintiff, which was caused by an overflow, which flooded the plaintiff's store wherein the goods were, and which was alleged to have been occasioned by an embankment constructed by the defendant across a creek. The complaint contained two counts.

During the examination of one Jemison, as a witness for the defendant, and after he had testified that he was section foreman of that portion of the defendant's road where the accident happened, and had been in charge of the trestle, he was asked to tell the jury "what other points along the road in the county of Lamar that same night were damaged that had never been damaged up to that time." The plaintiff objected to this question, upon the ground that it called for incompetent and immaterial evidence, the court sustained the objection, and to this ruling the defendant duly excepted. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence they must find for the defendant. (2) If the jury believe the evidence they cannot find a verdict for the plaintiff under the first count of the complaint. (3) If the jury believe the evidence they cannot find a verdict for the plaintiff under the second count of the complaint." (9) "If the jury believe from the evidence that there had been rains of as great magnitude before, and that the overflow, in this instance, was caused by the choking up of the water way under the trestle by timbers, brush, and other debris, which were not left lying in the path of the stream by the negligence of the defendant,

they must find for the defendant. (10) If the jury believe from the evidence that there had been rains of as great magnitude before, and that the overflow was caused, in this instance, by the choking of the water way under the trestle by timbers, brush, and other debris, which were not left lying in the path of the stream by the negligence of the defendant, they cannot find for the plaintiff." There were verdict and judgment for the plaintiff, assessing his damages at \$300.

Smith & Weatherly, for appellant.

W. A. Young, for appellee.

SHARPE, J. In the construction and maintenance of railroads common prudence requires the employment of at least ordinary engineering knowledge and skill, to the end of avoiding injury to property which will probably come from the obstruction of natural streams and water ways. While those engaged in such undertaking are not bound to provide against floods of which the usual course of nature affords no premonition, yet they are bound to use ordinary care to build so as not to obstruct to the damage of others rainfalls such as may reasonably be expected, whether they are likely to be of frequent or of rare occurrence. *Railroad Co. v. Bridges*, 86 Ala. 453, 5 South. 864, 11 Am. St. Rep. 58; *Railway Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Railway Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722; *Railroad Co. v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744; *Brown v. Railroad Co. (Pa.)* 38 Atl. 401, and notes. A structure which dams up a water way and causes the water to spread dangerously from its natural course may amount to a nuisance, and the maintenance, as well as the erection of a nuisance, with knowledge of its harmful character, may create a liability for resultant injuries. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646; *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575. Though the defendant acquired the railroad after the embankment complained of was built, its character, and that of the stream and surrounding country, together with common knowledge with which it was legally charged, concerning rainfalls to which the country was subject, may have been sufficient to show it had notice of the consequences which would naturally follow from continuing the existing conditions. There was evidence introduced on the trial sufficient to warrant the jury in finding defendant liable in damages as alleged in each count of the complaint, and which necessitated the refusal of charges 1, 2, and 3.

Not infrequently the drifting of timbers is incident to a flood; and where there are loose timbers along a stream due care in the construction or maintenance of a trestle may call for plans and methods to prevent their lodgment, and so prevent them from obstructing the water. Charge 9 refused to defendant improperly pretermitted inquiry as to defendant's fault in this respect, and charge 10 had a misleading

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tendency to confine the inquiry to negligence *vel non* in respect of the presence and accumulation of driftwood only.

There was no error in refusing to allow the witness Jemison to state "what other points along the line of road in the county of Lamar that same night were damaged that had never been damaged up to that time." To have pursued the investigation proposed by the question would have engendered an unprofitable multiplication of issues.

The judgment will be affirmed.

MAYOR, ETC., OF CITY OF NEWARK *v.* STATE BOARD OF
TAXATION *et al.*

(*Court of Errors and Appeals of New Jersey, Jan. 27, 1902.*)

[51 Atl. Rep. 67.]

Street Railways—Right of Way—Interest in Realty—Liability to Taxation—Purchase.*

A street railway company owns no interest in the soil of the highways over which its road passes which may be taxed as real estate, but the inherent value of its property above the cost of reproducing the material constituents of its line arises from its franchise, which is subject only to state, and not municipal, taxation.

Error to supreme court.

Certiorari by the mayor and common council of the city of Newark against the state board of taxation and the New Jersey Street Railway Company to review the action of the board in reducing the railroad company's assessment on its right of way. From a judgment of the supreme court (49 Atl. 525) reversing a decision of the board, respondents bring error. Reversed.

John W. Griggs and George T. Werts, for plaintiffs in error.

Henry Young and Herbert Boggs, for defendant in error.

GUMMERE, C. J. The judgment under review should be reversed for the reasons set forth in the dissenting opinion delivered by Garrison, J., in the court below. That there is an inherent value in the property of the North Jersey Street Railway Company over and above the costs of reproducing its rails, stringers, poles, wires, power house, etc., needs no demonstration. That value, however, springs not out of any ownership by the company of an interest in the soil of the highways over which its road passes, but out of its ownership of the franchise to maintain and operate its road over those highways, and to collect tolls from all persons traveling upon it. This franchise is property, and taxable as such. *State Board of Assessors v. Central R. Co.*, 48 N. J. Law, 146, 4 Atl. 578. But under present legislation the right to tax it has been reserved by the state to itself, through its state board of assessors, and not delegated to the several municipalities through which the company's road passes.

*See generally, 7 Rap. & Mack's Dig. 857 et seq.; 25 Am. & Eng. Enc. Law 105 et seq.

MINNEAPOLIS & ST. L. R. CO. v. KOERNER, State Treasurer.*(Supreme Court of Minnesota, Dec. 27, 1901.)*

[88 N. W. Rep. 430.]

Gross Earnings Tax—Purchase of Another Road Subject to Low Rate—Merger.

Under the gross earnings tax law the purchase of a railroad subject to the 1 per cent. tax by a company subject to the 3 per cent. tax does not operate as a merger, nor entitle the state to take into consideration the earnings of the former in estimating the gross earnings of the latter.

Same—Same—Enjoining Collection.

In an action brought to enjoin the state from collecting the additional 2 per cent. tax from such purchaser, *held*, that the complaint states a good cause of action.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Olin B. Lewis, Judge.

Action by the Minneapolis & St. Louis Railroad Company against August T. Koerner, state treasurer. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Albert E. Clarke, for appellant.

W. B. Douglas and C. W. Somerby, for respondent.

LEWIS, J. The complaint in this action alleges: That the Minneapolis, New Ulm & Southwestern Railroad Company was incorporated under the general laws of this state in 1895. That in pursuance of the powers granted in its articles of incorporation it constructed a line of railroad extending from Winthrop, in Sibley county, Minn., in a southerly direction through the counties of Sibley and Nicollet to New Ulm and Brown county. That under the provisions of sections 1667, 1668, and 1669, Gen. St. 1894, the railroad so constructed became and was subject to taxation as follows: A tax of 1 per cent. on its gross earnings during the years 1897, 1898, and 1899; 2 per cent. from 1900 to 1906, inclusive, in lieu of all other taxes and 3 per cent. thereafter. That such railroad company duly made a statement showing the amount of its gross earnings during 1897 and 1898, as required by law, and paid to the state treasurer 1 per cent. upon its gross earnings for those years. That on February 9, 1899, for a valuable consideration, appellant purchased the Minneapolis New Ulm & Southwestern Railroad, together with all the right of way, lands used in connection with it, railway tracks, bridges, depots, freight houses, etc., together with all and singular the rights, franchises, powers, privileges, immunities, and property of every kind; and that appellant has since the 9th day of February, 1899, been the owner and in possession thereof. That the tax estimated at 1 per cent. on the gross earnings for January and February of 1899, and for the last 10 months of 1899, was paid to the state treasurer by appellant. The com-

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plaint further charges that the state treasurer claims appellant is indebted to the state for the further tax of 2 per cent. upon such gross earnings, and that, unless paid, the treasurer will take proceedings to levy against appellant's property for the purpose of collecting the amount of the tax. The relief sought is an injunction against the state treasurer from proceeding to make the collection. A demurrer to this complaint was sustained by the trial court upon the ground that it did not state facts sufficient to constitute a cause of action.

Under the law of this state appellant is required to pay a tax of 3 per cent. on its gross earnings, and the state insists that the purchase of the New Ulm & Southwestern operated as a merger of that road into appellant's system, and that the earnings of the purchased road are to be estimated in making up the amount of the gross earnings of the purchaser. These acts have been construed adversely to the state's position in *State v. Railway Co.*, 36 Minn. 207, 30 N. W. 663. It has long been settled by the decisions of this state that the gross earnings tax law was not intended to change the character of the tax, but, for the purpose of certainty, was intended to change the method of computation. The amount required to be paid still remains a tax upon the railroad property, and not against the corporation. It is often referred to as the "commuted tax." Another purpose of enacting the law referred to was evidently to induce capital to become interested in railroad building. The legislature took note of the well-known fact that a new railroad in a new country might, for some years, be a matter of experiment, and in its first experience unprofitable; but that, as the country through which it runs is settled and developed, the railroad business increases, and, in proportion, the company becomes able to pay a higher rate of taxation. In its wisdom, the legislature adjusted the tax to those experimental stages as provided in the act. It was immaterial to the state whether such new roads continued to be operated under a lease or by a purchaser, or whether they continued to be owned and operated by the original corporation. The act contains no express prohibition to a sale and transfer of such railroads to companies already subject to the 3 per cent. gross earnings tax, and there is no language from which it can be implied. If it be conceded that a merger arises where roads paying a 1 per cent. tax are sold to a company paying a 3 per cent. tax, the converse must be equally true, and a merger occurs when a road paying a 3 per cent. tax is sold to a company paying a 1 per cent. tax. The statutes are not capable of any such construction, and our conclusion is that no change has been effected in the rate of taxation on the gross earnings of the Minneapolis, New Ulm & Southwestern road from the fact that it has been purchased and is now operated by appellant.

The complaint states a good cause of action. Order reversed.

**WILLIAM B. DINSMORE *et al.*, Executors and Trustees, *v.*
SOUTHERN EXPRESS COMPANY *et al.***

(Argued February 25, 1901. Decided November 18, 1901.)

[22 Sup. Ct. Rep. 45.]

War Revenue Act—Express Companies—Effect of Amendatory Act.

The exemption of express companies by the amendatory act of March 2, 1901, chap. 806, from the requirement of the war revenue act of June 13, 1898, chap. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests, or other evidences of the receipt of goods for carriage or transportation, requires the affirmance on certiorari, without reference to the merits of the case as affected by the earlier act, of a judgment of the circuit court of appeals affecting the dismissal of a suit to prevent the application by an express company of any of its moneys to meet this requirement.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision reversing a decree of the Circuit Court for the Southern District of Georgia which enjoined the enforcement of an order of the Railroad Commission of Georgia requiring an express company to pay the war stamp tax. Affirmed.

See same case below, 42 C. C. A. 623, 102 Fed. 794.

The facts are stated in the opinion.

Messrs. William K. Miller and Frank H. Miller for petitioners.

Messrs. Joseph M. Terrell and Fleming G. duBignon for respondents.

MR. JUSTICE HARLAN delivered the opinion of the court:

William B. Dinsmore and others, citizens of New York,—some of them being executors and trustees under the will of the late William B. Dinsmore of that state,—brought this action on the 17th day of April, 1897, in the circuit court of the United States for the southern district of Georgia against the Southern Express Company, a corporation of Georgia having its principal place of business in that state, and also against L. N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, constituting the Railroad Commission of Georgia, and Joseph M. Terrell, Attorney General of Georgia, the individual defendants being citizens of Georgia.

The plaintiffs sued as owners and holders of shares of stock in the defendant express company, and sought a decree that would prevent the application by that corporation of any of its moneys to meet the requirement of the war revenue act of June 13th, 1898, chap. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests, or other evidences of the receipt of goods for carriage or transportation.

The portion of that act to which the bill referred is the following:

“Express and Freight: It shall be the duty of every rail-

road or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person for whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: Provided, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation, or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 30 Stat. at L. 448, 459, chap. 448.

After the passage of the above act complaint was made by citizens of Georgia to the railroad commission of that state to the effect that the defendant express company required shippers or consignors to supply the requisite stamps for bills of lading or receipts given to them. The commission thereupon, July 11th, 1898, ordered that the Southern Express Company appear before it on the 18th day of July, 1898, "then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

The company appeared and denied the jurisdiction of the commission. But on August 2d, 1898, the commission, after hearing the parties, ordered that the required stamp be supplied by the express company, and not by shippers in whole or in part.

Appropriate allegations having been made to show that the suit was not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, the relief asked was—

That it be adjudged and decreed that the order of the railroad commission of the state of Georgia of August 2d, 1898, requiring the express company to pay the amount of the war revenue tax on business from one point to another in the state without endeavoring to collect the same from shippers, or requiring them to make the payment thereof before the issuing of receipts or bills of lading, was unconstitutional, null, and void; that the express company, its officers and agents, be restrained from voluntarily complying with the order of the

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commission of August 2d, 1898, and paying such tax; that the attorney general of the state be restrained from instituting any suit against the express company for the purpose of enforcing the provisions of the above order of the railroad commission; that a perpetual injunction of the same purport, tenor, and effect be granted to complainants; and that the plaintiffs have such other and further relief in the premises as the nature of the case required and to a court of equity might seem meet.

The railroad commissioners and the attorney general of the state severally demurred to the bill. The case having been argued upon the demurrers, Judge Speer delivered an opinion which is reported in 92 Fed. 714.

That opinion was accompanied by the following order, entered March 7th, 1899. "It is now upon consideration ordered, adjudged, and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question be, and the same is hereby, denied; ordered, adjudged, and decreed further that the defendants, the Railroad Commission of Georgia, and each member thereof, to wit, the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, be, and the same are hereby, enjoined from any and all order, direction, action, or legal steps instituting or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission, dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax." The court in its opinion said: "It is not deemed necessary to enjoin the Attorney General, for it is presumed that the eminent lawyer who is the official head of the bar of the state will, without such injunction, accord all appropriate respect to the decision of the court."

Upon appeal to the circuit court of appeals the decree of the circuit court was reversed, June 7th, 1900, with directions to dismiss the case, Judge McCormick delivering the opinion of the court, Judge Shelby dissenting. 42 C. C. A. 623, 102 Fed. 794.

The case was thereupon brought to this court upon writ of certiorari and was submitted for decision at the last term.

After the submission of the case in this court the above part of the war revenue act of 1898 relating to stamps to be attached to bills of lading, manifests, etc., was amended in important particulars by an act of Congress approved March 2d, 1901, chap. 806. One amendment, which took effect on and after July 1st, 1901, provided that the above part of the act of 1898 should be amended to read as follows:

"Freight: It shall be the duty of every railroad or steamboat company, carrier, or corporation, or person whose occu-

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pation is to act as such, except persons, companies, or corporations engaged in carrying on a local or other express business, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: Provided, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, or corporation, or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 31 Stat. at L. 938, 945, chap. 806.

This change in the law renders it unnecessary to consider any of the important questions determined in the circuit court and circuit court of appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of the railroad commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations, and persons shall attach the required stamp to bills of lading, manifests, and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties. The plaintiffs do not need any relief, because the act of 1901 accomplishes the result they wished.

Although this cause was determined in the circuit court of appeals and was submitted here prior to July 1st, 1901, our judgment must have some reference to the act of 1901. In *United States v. The Peggy*, 1 Cranch, 103, 109, 2 L. Ed. 49, 50, the Chief Justice, delivering the opinion of the court, said: "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation." *Mills v. Green*, 159 U. S. 651, 653, 40 L. Ed. 293, 16 Sup. Ct. Rep. 132; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. Ed. 382, 16 Sup. Ct. Rep. 321, 161 U. S. 101, 40 L. Ed. 632, 16 Sup. Ct. Rep. 492.

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If the cause had not been submitted in the circuit court of appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared, and that the order of the railroad commission, even if originally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as well as the question whether the railroad commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898.

As the order of the circuit court of appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the circuit court; and the judgment must be affirmed without costs in this court.

It is so ordered.

STATE v. CANDA CATTLE CAR CO.

(*Supreme Court of Minnesota, Feb. 21, 1902.*)

[89 N. W. Rep. 66.]

Taxation—Interstate Commerce—Uniformity.*

Chapter 160, Laws 1897, construed as authorizing and providing for a tax upon the property of corporations engaged in interstate commerce, and coming within its operation, for which it was competent for the legislature to provide, but the rate of taxation imposed thereby (2 per cent. upon the value of such property), not being uniform with the rate imposed by law upon other property similarly taxed, renders the act in violation of section 1 of article 9 of the constitution of this state, and void, as unequal taxation.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Edwin I. Jaggard, Judge.

Action by the state against the Canda Cattle Car Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

W. B. Douglas, Atty. Gen., and C. W. Somerby, Asst. Atty. Gen., for the State.

Davis, Kellogg & Severance, for respondent.

BROWN, J. This action was brought to recover the sum of \$480, together with penalties and interest, the amount of a

*As to the taxation of railroad companies engaged in interstate commerce, see *Cumberland & P. R. Co. v. State* (Md.), 20 Am. & Eng. R. Cas., N. S., 754, and note, 768 et seq.; *City of York v. Chicago, etc., R. Co.* (Neb.), 14 Am. & Eng. R. Cas., N. S., 200, and note, 208; 25 Am. & Eng. Enc. Law 655 et seq.; 6 Rap. & Mack's Dig. 1 et seq.

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tax assessed against the property of defendant under and pursuant to the provisions of chapter 160, Laws 1897, entitled "An act providing for the taxation of freight line and equipment companies." Defendant interposed a general demurrer to the complaint, which was sustained by the court below, and plaintiff appealed.

The facts are as follows: Defendant is a corporation organized and created under the laws of the state of West Virginia, and comes within the definition of a "freight line company," within the meaning of chapter 160, Laws 1897. During the year 1898 it was the owner of and engaged in the business of operating and running a large number of freight cars and transporting freight therein over various lines of railroad extending through this state, but not as lessor or owner of the roads. Pursuant to the provisions of the act aforesaid, defendant filed with the state auditor a statement concerning its property, capital stock, etc., from which the state board of equalization duly fixed and determined the amount and value of its taxable property at \$24,000. Whereupon the defendant was assessed the amount of \$480 as a tax upon such property, the same being equivalent to 2 per cent. on the value so fixed and determined. Defendant refused to pay the tax on the ground and claim that the statute aforesaid was unconstitutional and void, and the proceedings thereunder a nullity. The only question presented for consideration is in reference to the validity of the statute. Section 1 of the act is devoted to defining freight line and equipment companies, and, as we have stated, defendant comes within a freight line company as there defined. Section 2 of the act requires every company coming within its operation to submit under oath to the state auditor a statement containing information as to the number of shares of its capital stock and the par and market value thereof, the value of real estate owned by it in this state, the length of lines of railway over which its cars are run, the length of so much of such lines as is without and within the state, and the whole number and value of the cars owned and operated by it. Section 3 constitutes the state board of equalization a board of assessors and appraisers, and directs that it annually assess the property of such companies, determining the taxable value thereof from the information conveyed by the statement required to be made by section 2. Opportunity is afforded the companies to appear before the board and be heard on any application to review or correct the proceedings had by them. Section 5 provides: "It shall be the duty of the state auditor in the month of November, annually, to charge and collect from each freight line and equipment company doing business or owning cars which are operated in this state, a sum in the nature of an excise tax or license, to be computed by taking two (2) per cent. of the amount fixed by the state board of appraisers and assessors as the value of the proportion of the capital stock representing

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the capital and property of such company owned and used in Minnesota, and certified to the state auditor after deducting the value of the real estate of the company in Minnesota, assessed and taxed locally, if any there be." It is contended by defendant: (1) That, if the tax authorized to be levied and assessed by this act is construed to be a license tax imposed upon defendant as a condition to its right to do business in this state, it is in violation of section 8, art. 1, of the constitution of the United States, as an interference with interstate commerce, and beyond the power of the state to impose; and (2) that, if it be construed as a tax upon property owned by the defendant situated in this state, it is in violation of sections 1 and 3 of article 9 of the constitution of this state, as unequal taxation. There can be no question that defendant, being a foreign corporation engaged in the transportation of freight over lines of railroad running into and through this state, is engaged in interstate commerce within the meaning of the federal constitution and the decisions of the supreme court of the United States; and, if the act under consideration is to be construed as imposing upon it a license fee as a condition to its right to do such business in this state, it is unconstitutional and void. The language of the act is that the state board of equalization shall impose a tax "in the nature of an excise tax or license," but a reading of the whole act shows beyond any doubt that it was not the intention of the legislature that the tax should be a license fee imposed as a condition to the right of such corporations to do business in this state. It is beyond the power and authority of the legislature to do so, and we are bound to presume that the intention of the legislature was to enact a constitutional statute. The law is thoroughly settled that a state may exclude from its limits foreign corporations seeking to do business therein, and may impose whatever limitations and restrictions it may choose as conditions to their right to come into the state and do business with its citizens; but the rule does not apply to foreign corporations engaged in interstate commerce. *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Pickard v. Car Co.*, 117 U. S. 48, 6 Sup. Ct. 635, 29 L. Ed. 785. The conclusion, therefore, must be that the tax imposed by this statute was not intended by the legislature as a license tax. But from the fact that it is beyond the power of the legislature to impose a license tax upon such corporations it does not follow that their property, employed and used in interstate commerce, may not be subjected to taxation like other property within the jurisdiction of the state. The right of a state to provide for the taxation of such property was sustained by the supreme court of the United States in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41

L. Ed. 683; and *Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899. And the method for determining the value of such property as provided in the act under consideration has been sustained. We do not understand counsel for the state to contend seriously that the tax provided for by this act is not a property tax within a proper construction of the statute. It seems to us that the question is not open to serious debate, and we turn to the vital question in the case, namely, whether the rate of taxation therein imposed is arbitrary and unequal, and, in consequence, repugnant to the constitution of the state. The constitution of the state provides that all taxes to be raised shall be as nearly equal as may be; and all property upon which the same are levied shall have a cash valuation, and be equal and uniform throughout the state. Perfect equality in taxation is, perhaps, impossible, made so by the failure of property owners to disclose all their taxable property to the assessor, and the inability of the latter to discover it when not voluntarily listed; in consequence of which taxes are not borne in proportion to the amount of property owned by each taxpayer. But all laws providing for their assessment and collection should have that object in view. "In the exercise of the power of taxation the purpose always is that a common burden shall be sustained by common contributors, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. The power is not arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially." *Cooley, Tax'n*, 22. This does not require that all persons shall be taxed alike. The nature and character of property and property rights subject to taxation as respects personalty renders absolute uniformity impracticable, and necessitates a resort to different methods for bringing intangible property to the tax list. But where the method adopted is a tax upon property based upon valuation, the rate imposed must be uniform, and apply alike to all who are thus taxed. The property of one citizen may not be taxed at a greater rate than that of another. And, however difficult it may be to attain equality in other respects, a uniform rate may and must be imposed in this class of taxation. The act under consideration fixes a uniform rate of 2 per cent. upon the valuation of the property of corporations coming within its operation, while the general rate of taxation upon other property in the state is fixed and determined by the amount of taxes necessary to be raised for the purposes of defraying the public expenses. It may be 1, 2, 3, or 4 per cent. The contention of defendant is that the rate so fixed by the act is in violation of the equality provision of our constitution and consequently void. We think, for reasons already stated, defendant's position must be sustained. *City of Brookfield v. Tooley* (Mo.) 43 S. W.

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387; State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970; State v. Cumberland & P. R. Co., 40 Md. 22.

Counsel for the state recognize the apparent soundness of the contention, but urge that, because the general rate of taxation throughout the state in the year 1898 was greater than that imposed by the act, defendant is in no position to complain. This would seem at first thought to be worthy of consideration, but reflection proves that the position is untenable. The statute must be construed in the light of its general future application and operation, and not with reference to conditions existing at any particular time. Though the tax against defendant for the year 1898, sought to be recovered in this action, was less than the rate upon other property in the state, such general rate might be less than 2 per cent. another year, while the rate against defendant would remain unchanged. The general rate varies from year to year, but the rate imposed upon defendant is fixed and certain, and does not vary with the rate imposed on other property. A rule that would limit inquiry into the constitutionality of a statute to those injuriously affected would, in a measure at least, render the fundamental guaranty of equality before the law inoperative, and of no practical value. The act under consideration, if such rule were adopted, would be constitutional when the general rate of taxation is greater than that imposed thereby upon corporations like defendant, and unconstitutional when the general rate was less than that imposed on such corporations. It is manifest that this contention cannot be sustained. The act, in so far as it attempts to impose a tax upon freight line companies, is perfectly valid, and within the power of the legislature; but the rate of taxation imposed thereby, being arbitrary, and not uniform with the rate imposed on other property similarly taxed is unequal, and in violation of the equality provision of our constitution, and consequently void. If the rate imposed were uniform with the average rate imposed on other property in the state, the act could be sustained.

Order affirmed.

**NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. CITY OF
NEWPORT NEWS.**

(Supreme Court of Appeals of Virginia, Jan. 23, 1902.)

[40 S. E. Rep. 645.]

Taxation—Authority of City.

Under Acts 1895-96, p. 93 (Newport News City Charter, § 104), providing that the city council may raise taxes by assessments on all subjects taxable by the state, etc., the municipality has power to impose taxes on all subjects not withheld from taxation by the legislature, whether they be taxed by the state or not.

Same—Same—Street Railways Subject to Both License Tax and Ad Valorem Taxation.

Under Const. art. 10, § 4, authorizing the general assembly to levy

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license taxes on lines of business not capable of ad valorem taxation, the fact that the property of a street railway is subjected to ad valorem taxation by the state does not prevent a municipality from imposing a license tax in addition to taxation by the municipality on the ad valorem basis; the privilege of operating a street car line being a proper subject for a license tax.

Same—Same—Same—Unequal Taxation.*

The imposition of a license tax by a municipality upon "each and every street railway company," in addition to ad valorem taxation on a company's property, is not unequal taxation, since the only uniformity required as to licenses is that the tax shall be the same on all those in the same business.

Same—Same—Same—Double Taxation.†

The imposition of a license tax upon a street railway, in addition to a tax upon the property used in carrying on the business, is not double taxation.

Same—Same—Street Railways—License Tax.

Acts 1895-96, p. 94 (Newport News City Charter, § 105), authorizing a license tax on certain named pursuits, and all other business and pursuits on which a license tax is levied by the state, does not preclude the city from levying a license tax on any business not specifically mentioned; but a street railway, though not specifically mentioned, may be made the subject of a license tax.

Same—Same—Same.

The fact that the lines of a street railway system extend beyond the limits of any one municipality does not prevent its taxation by a city whose streets it traverses.

Same—Same—Same—License Tax—Exemptions.

To entitle a city to levy a license tax on a street railway, it is not necessary that the right so to do be reserved in the ordinance granting the franchise; the right to levy taxes not arising from contract, and exemption from taxation never being presumed.

Error to corporation court of city of Newport News.

Action by the Newport News & Old Point Railway & Electric Company against the city of Newport News. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

O'Ferrall & Regester and E. M. Braxton, for plaintiff in error.

J. A. Massie, for defendant in error.

HARRISON, J. This record brings in question the authority of the city of Newport News to levy a license tax upon the Newport News & Old Point Railway & Electric Company, as provided in section 79 of its tax ordinance, which is as follows:

"On each and every street railway company twenty-five dollars each for the first ten cars, and ten dollars on each car in addition thereto used in the city, and an additional tax of fifty cents on each and every pole owned by said company in this city."

It is contended that this ordinance is invalid, because in violation of section 1 of article 10 of the constitution of Virginia, which secures equal and uniform taxation, and is also

*See 12 Am. & Eng. R. Cas., N. S., 874, and note, 875 et seq.

†See 25 Am. & Eng. Enc. Law 666 et seq.

obnoxious to section 4 of the same article, which authorizes the general assembly to levy a tax upon certain licenses named in the section, and all other business which cannot be reached by the ad valorem system; the argument being that, inasmuch as no license tax is imposed upon the plaintiff in error by the state, its property being reached by the ad valorem system for purposes of state taxation, no license can be imposed by the city until the state abandons its method of taxation, and declares that the property cannot be reached by the ad valorem system.

Section 104 of the charter of Newport News (Acts 1895-96, p. 93) provides that, "For the execution of its powers and duties the council may raise taxes annually by assessments in said city on all subjects taxable by the state, such sums of money as it shall deem necessary to defray the expenses of the same, and in such manner as it shall deem expedient, in accordance with the laws of this state and of the United States."

This language is substantially the same as that found in the charters of other cities of this commonwealth, and has been repeatedly construed and held to confer upon the city council general powers of taxation, including all persons and subjects of taxation, except only as it may be limited by the laws of the state or of the United States. *Ould v. City of Richmond*, 23 Grat. 464, 14 Am. Rep. 139; *Humphrey's v. City of Norfolk*, 25 Grat. 97; *W. U. Tel. Co. v. City of Richmond*, 26 Grat. 1; *City of Norfolk v. Norfolk Landmark Pub. Co.*, 95 Va. 564, 28 S. E. 959.

When the legislature confers upon a municipality general powers of taxation, it grants all the powers possessed by itself in respect to the imposition of taxes; and the city can then impose taxes, in its discretion, upon all subjects within its jurisdiction not withheld from taxation by the legislature, whether they be taxed by the state or not. It was accordingly held in the case last cited that the city of Norfolk was authorized, by substantially the same language as that employed in section 104 of the charter of Newport News, to impose a license tax on the business of publishing a newspaper, although not so taxed by the state.

The property of the plaintiff in error being assessed upon the ad valorem basis for purposes of state taxation it is insisted that under the recent decisions of this court in *Thomas v. Snead*, 39 S. E. 586, the city can exact no license tax of the plaintiff in error, but must be confined to taxing its property upon the ad valorem system. The question involved in that case was the power of the city of Lynchburg to exempt the capital stock of certain manufacturing enterprises in that city from taxation. The capital of these joint-stock companies was taxed by the state upon the ad valorem basis. The court held that the city had no power to exempt the capital thus invested from taxation; and, in pointing out the method by

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which alone it could be taxed by the city, the court further held that inasmuch as the legislature had determined that the capital stock of such manufacturing enterprises could be reached by the ad valorem system, and so reached it for purposes of state taxation, no other method of reaching the same was open to the city. The case at bar presents a very different question. The city of Newport News is not proposing to exempt the plaintiff in error from taxation. On the contrary, the property used in conducting its street railway business is taxed by the city upon the ad valorem basis, as it is by the state. The ordinance in question imposes, in addition, a license tax upon the privilege enjoyed of conducting the street car business. That the privilege of running street cars through the crowded thoroughfares of a city is, in the discretion of the council, a legitimate subject upon which to impose a license tax, either for the purposes of raising revenues under its general powers of taxation, or in the exercise of its general police power, cannot be seriously questioned. Booth, St. Ry. Law, § 280; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 375, 2 Sup. Ct. 257, 27 L. Ed. 419; City of Springfield v. Smith (Mo.) 40 S. W. 757, 37 L. R. A. 446, 60 Am. Rep. 569; Allerton v. City of Chicago (C. C.) 6 Fed. 555; Frankford & P. Pass. Ry. Co. v. City of Philadelphia, 58 Pa. 119, 98 Am. Dec. 242; City of San Jose v. San Jose & S. C. R. Co., 53 Cal. 475; Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221, 30 Am. Rep. 545; City of Allentown v. W. U. Tel. Co., 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820.

The license tax required is not unequal taxation, because the ordinance imposing it applies alike to all street railway companies. Uniformity must be such as is compatible with the subject-matter, and as to licenses the only uniformity required is that the tax shall be the same on all those in the same business. Com. v. Moore, 25 Grat. 951. Nor is it double taxation to require a street railway company to pay a license tax for the privilege of conducting its business, and at the same time to impose a tax upon the property used in carrying on that business. Morgan's Case, 98 Va. 812, 35 S. E. 448. In Morgan's Case, Judge Buchanan, speaking for the court, says: "Attorneys at law, physicians, and others pay license taxes for the privileges of practicing their professions and conducting their business, and taxes are imposed upon the property used by them in carrying on their professions and business. This has never been considered double taxation."

The position is not tenable, that because street railways are not mentioned in section 105 of the city charter, which authorizes a license tax upon certain pursuits therein stated, they are therefore excluded from such taxation, under the maxim, "Expressio unius est exclusio alterius." It is clear, the legislature did not undertake to enumerate all the subjects

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and classes upon which a license tax might be imposed. On the contrary, it plainly indicated that there were other pursuits not named that might be licensed, by its use, after the callings specifically mentioned, of the broad language, "and upon all other business and pursuits upon which a license tax is levied by the state, and such other business as may be lawful." If the contention were sound, that the city was limited in its power to impose a license to the pursuits enumerated in section 105, it would sweep away the power of taxation from a large class of subjects, the constitutionality of which has never been questioned, and in some cases have already been affirmed by this court as subject to a license tax. *Com. v. Moore*, supra.

The street railway line of the plaintiff in error extends beyond the corporate limits of Newport News, and through the county of Elizabeth City, to the adjacent towns of Hampton and Phoebus. It is suggested that a railway company is an entirety, and cannot be spoken of as actually located in any county, city, or town which it traverses. Granting this to be true, still it may be taxed by the city, the streets of which are traversed by it, upon the business done in such city, although its lines extend beyond the city limits. *Florida Ry. Co. v. Columbia, 1 Mun. Corp. Cas. 608*; *City of San Jose v. San Jose & S. C. R. Co.*, 53 Cal. 475.

It is further contended that the right to assess a license tax upon the plaintiff in error, in order to be exercised, should have been reserved to the city in the ordinance granting the company the right to construct its tracks and operate its cars on the streets. This position is not sound. The right to levy taxes does not arise out of contract. Exemption from taxation is never to be presumed. The legislature cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. In *Booth, St. Ry. Law*, § 281, the learned author says: "In construing the charter of a company conferring authority to construct and operate a street railway, the right to exact license fees will not be denied because it has not been expressly reserved in the grant; and where the contract between the city and the company does not, in terms, dispense with the payment of a license, the rights of the latter are not impaired by a subsequent ordinance requiring such payment." It has been repeatedly held that a municipal ordinance granting to a street railway company a franchise to construct its tracks and operate cars upon the streets of the city, and which is silent upon the question of taxation, cannot be construed as conferring immunity from the payment of a license tax in the absence of an express stipulation to that effect. *New Orleans C. & L. R. Co. v. City of New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121; *Memphis Gaslight Co. v. Taxing Dist. of Shelby Co.*, 109 U. S. 398, 3 Sup. Ct. 205, 27 L. Ed. 976; *City of Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757.

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37 L. R. A. 446, 60 Am. St. Rep. 569; City of New Orleans v. New Orleans City & L. R. Co., 40 La. Ann. 587, 4 South. 512; Same v. Orleans R. Co., 42 La. Ann. 4, 7 South. 59, 21 Am. St. Rep. 365; City of San Jose v. San Jose & S. C. R. Co., 53 Cal. 475; State v. Hilbert, 72 Wis. 184, 39 N. W. 326.

Nowhere in the ordinance under which the plaintiff in error was authorized to construct its tracks and operate its cars is there, either in terms or by implication, an exemption from the tax imposed by the city. The company took its charter subject to the same right of taxation in the city that applies to all other privileges and to all other property. If it wished or intended to have an exemption of any kind from taxation, it should have obtained a provision to that effect in its charter. 109 U. S. 398, 3 Sup. Ct. 205, 27 L. Ed. 976.

Upon the whole case, we are of opinion that the ordinance complained of is not in conflict with the constitution and laws of either this state or the United States, but is a legitimate exercise of municipal power; and the judgment of the corporation court of the city of Newport News, so holding, must be affirmed.

Affirmed.

CHICAGO & N. W. RY. CO. v. PEOPLE *ex rel.* MCGOUGH,
Tax Collector.

(*Supreme Court of Illinois, Feb. 21, 1902.*)

[62 N. E. Rep. 869.]

Taxation—Stock Pens Not Part of Track.*

A railroad company owned a tract of land of about 30 acres, adjoining its right of way, on which were buildings and conveniences for yarding and feeding sheep, and for loading and unloading sheep to and from cars on the main and side tracks. The tract was entirely surrounded by a fence, and the only railroad track thereon was a stub, about 500 feet long, used for conveying feed to the buildings, and shut off from the right of way by a gate when not so in use. The revenue law (Hurd's Rev. St. 1899, p. 1401, § 42) provides that a railroad "right of way, including the superstructures of main, side, or second track and turn-outs, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purpose of taxation and denominated 'railroad track'": *held*, that such 30-acre tract was not railroad track, within the meaning of such section.

Same—Conclusiveness of Schedules.

Revenue Act, § 41, requires railroad companies to make and file with the county clerk a sworn statement and description of the property held by it as right of way, together with improvements thereon; and section 48 requires it at the same time to return a schedule to the auditor of public accounts of the property held by it as "railroad track"; and subsequent sections provide that the property so returned shall be assessed by the state board of equalization. Section 46 provides that all real estate belonging to a railroad company, other than that denominated "railroad track," shall be listed as lands or lots in

*See Chicago, etc., Ry. Co. v. Cass County (N. Dak.), 11 Am. & Eng. R. Cas., N. S. 813, and note, 821 et seq.; 25 Am. & Eng. Enc. Law 65 et seq.

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the district where located. Section 47 directs the county clerk to return to the assessor a copy of the schedule of real estate, other than "railroad track," pertaining to a railroad, to be assessed by such assessor as other property in his district. Section 49 provides that, if any company neglects to return such schedules, the property so to be returned and listed by the assessor shall be listed and assessed as other property. Section 77 provides that if the assessor finds that any real estate subject to taxation has not been returned to him by the clerk, or has been incorrectly returned, he shall correct the clerk's return and assess such property. A railroad company improperly included in its schedules, as "railroad track," a 30-acre tract used for yarding and feeding sheep, and it was omitted from the copy schedule returned by the county clerk to the assessor: *held*, that the assessor was not bound to follow the schedule furnished to him by the county clerk, but properly assessed such tract as omitted property.

Appeal from Kane county court; M. O. Southworth, Judge.

Action by the state of Illinois, on the relation of McGough, collector of taxes, against the Chicago & Northwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Botsford, Wayne & Botsford, for appellant.

W. J. Tyers, State's Atty., and Russell & Hazlehurst, for appellee.

HAND, J. This is an appeal from a judgment of the county court of Kane county against certain delinquent real estate belonging to the appellant, known as the "La Fox Sheep Yards," situated near La Fox station, in the township of Blackberry, Kane county, Ill., and described as lot 4 of the S. W. $\frac{1}{4}$ of section 2, township 39, range 7, containing 29.23 acres, with the improvements thereon, for the taxes claimed to be due for the year 1900. The taxes in question were levied on said land upon an assessment made by the local assessor, and upon application by the county collector for judgment the appellant appeared and filed objections, which being overruled, judgment was rendered against the land for the amount of said taxes. The objections were, in substance, that said land constituted a part of the property of appellant denominated by the revenue law "railroad track," and that the assessment thereof by the local assessor was without authority of law and void, and that the appellant in the year 1900 duly returned said land to the county clerk of said county as a part of its right of way, as "railroad track," and that upon such return said land was duly assessed by the state board of equalization, and that taxes for that year were duly extended upon such assessment, and had been paid by the appellant.

If the land in question belongs to that class known in the revenue law as "railroad track," then it was assessable by the state board of equalization, and the local assessor had no power to make the assessment. If, on the other hand, the land is real estate other than "railroad track," then the assessment by the local assessor was valid, and the judgment rendered, regular. The principal question, therefore, to be determined in this case, is whether said land is a part of the

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appellant's "railroad track," within the meaning of sections 41 and 42 of the revenue law (Hurd's Rev. St. 1899, p. 1401). Section 41 thereof requires railroad companies to make out and file with the county clerk of each county in which their railroads may be located a statement or schedule "showing the property held for right of way, and the length of the main and all side and second tracks and turn-outs in such county, and in each city, town and village in the county, through or into which the road may run, and describing each tract of land, other than a city, town or village lot, through which the road may run, in accordance with the United States surveys, giving the width and length of the strip of land held in each tract, and the number of acres thereof. They shall also state the value of improvements and stations located on the right of way." Section 48 required the railroad company at the same time to return a schedule to the auditor of public accounts of the property denominated "railroad track," giving the length of the main and side or second tracks and turn-outs, etc.; and subsequent sections require these schedules to be laid before the state board of equalization, and authorize and provide for an assessment of the property thus scheduled by said board. Section 46 provides that "all real estate, including the stations and other buildings and structures thereon, other than that denominated 'railroad track,' belonging to any railroad, shall be listed as lands or lots, as the case may be, in the county, town, village, district or city where the same are located." Section 47 directs the county clerk to return to the assessor of the town or district, as the case may require, a copy of the schedule of the real estate other than "railroad track," and of the personal property other than "rolling stock," pertaining to the railroad, and provides that such real and personal property shall be assessed by the assessor. It further provides that such property shall be treated in all respects, in regard to assessment and equalization, the same as other similar property belonging to individuals, except that it shall be treated as property belonging to railroads, under the terms of "lands," "lots," and "personal property." Section 49 provides: "If any person, company or corporation, owning, operating or constructing any railroad, shall neglect to return to the county clerks the statements or schedules required to be returned to them, the property so to be returned and assessed by the assessor shall be listed and assessed as other property." Section 77 provides: "If the assessor finds that any real estate subject to taxation, or special assessment, has not been returned to him by the clerk, or if returned, has not been described in the subdivisions, or manner required by section 66 of this act, he shall correct the return of the clerk; and shall list and assess such property in the manner required by law." And section 42 defines what shall be denominated "railroad track," within the meaning of the revenue law, as follows: "Such right of way, including the superstructures of main, side or second

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track and turn-outs, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line in entering the county, city, town or village, and extending to the point where such track crosses the boundary line leaving such county, city, town or village, or to the point of termination in the same, as the case may be, containing — acres, more or less, (inserting name of county, township, city, town or village, boundary line of same, and number of acres, and length in feet,) and when advertised and sold for taxes, no other description shall be necessary.

It appears from the evidence that the land in question adjoins the right of way of the appellant on the south, is entirely surrounded by a fence; has located thereon barns, sheep yards, sheep pens, an elevator, water tank, electric light plant, and other appliances necessary for yarding and feeding sheep; that the only railroad track located thereon is a stub, some four or five hundred feet in length, used for the convenient unloading at the buildings of cars of feed for use in the yard, which is shut off from the right of way by a gate when not in use; and that the yard is so arranged that sheep can be conveniently loaded and unloaded through chutes onto and from cars on the main and side tracks, directly into and from the yard. We think it clear the real estate in question cannot be said to be in any proper sense "railroad track," within the definition of that class of real property as given by section 42 of the revenue law. In *Railroad Co. v. Paddock*, 75 Ill. 616, it is said (page 617): "Under the revenue law, * * * the right of way, including the superstructures of main, side, or second track and turn-outs, and the stations and improvements of the railroad company on such right of way, are declared to be real estate, for the purpose of taxation, and denominated 'railroad track,' and must be so listed and valued. 'Railroad track' is to be assessed by the state board of equalization, but all other real estate, including the stations and other buildings and structures thereon, is to be assessed by the local assessors. * * * By the 'right of way' can only be understood the land used as a way for the road, and not such additional ground as may be used for the convenience of the road, but not as a part of its 'way.'" In *Chicago & A. R. Co. v. People*, 98 Ill. 350, we said (page 360): "A tract of land cannot be regarded right of way merely because one or even two or more side tracks may be constructed upon or over it, but the land must be appropriated * * * to that purpose." In *Chicago, B. & Q. R. Co. v. People*, 136 Ill. 660, 27 N. E. 200, it is said (page 665, 136 Ill., and page 202,

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27 N. E.) the lands in question "are not, and never have been, actually appropriated by the appellant as a part of its right of way, and so does not come within the definition of 'railroad track.'"

The statute divides the real property of railroads into two classes, viz., "railroad track," and "all real estate, including the stations and other buildings and structures thereon, other than that denominated 'railroad track.'" To hold this land "railroad track" would, in effect, be to abrogate section 46 of the statute, which provides for the assessment of the real estate of railroad companies other than that denominated "railroad track." In order that real estate may be denominated "railroad track," it need not be confined to the land over which the main track of a railroad company is constructed, but may include side or second tracks and turn-outs, with the superstructures, stations, and improvements thereon. It must, however, be substantially appropriated for right of way purposes, and in use for such purposes, and all real estate belonging to a railroad company not so used should be assessed as "real estate other than that denominated 'railroad track.'" The fact that real estate is used for railroad purposes will not make it assessable as "railroad track." To properly denominate it "railroad track," it must be used as right of way, and not otherwise. In discussing this question in *Railway Co. v. Miller*, 72 Ill. 144, it is said (page 147): "We must take the averment in the bill that these lots are used by appellant as right of way, confessed, as it is, by the demurrer, to be true. It then follows that under the forty-second section they fall under the denomination of 'railroad track.'" In *Railroad Co. v. Weber*, 96 Ill. 443, it is held that the term "railroad track" embraces property held for right of way, including superstructures thereon. In *Chicago & A. R. Co. v. People*, supra, it was held a tract of land in the city of Bloomington containing something over 32 acres was a part of the "railroad track" of the Chicago & Alton Railroad Company. It appeared that the main tracks of the company ran across said land, occupying a strip of land 100 feet in width, and that upon the residue of said land were situated the car shops, machine shops, blacksmith shops, foundry, roundhouse, freight depot, stock yards, paint shops, etc., of said company, and that the entire tract was covered with railroad tracks continually in use for the purpose of running the cars and engines over them, and for switching cars, making up trains, loading and unloading cars, and for various other purposes in the transaction of the company's business as a common carrier; and it was said that the land "in actual use by the railroad company for side tracks, switches, and turn-outs must be regarded, within the meaning of the revenue law, as a part of the right of way of the company." In *Chicago & A. R. Co. v. People*, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5, land constituting the actual right of way of the company's side track, running from the company's main track to a stone quarry owned by the company,

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and which it was working for the purpose of obtaining stone for railroad purposes, was held a part of the company's right of way, within the meaning of the revenue law, so as to be properly returned and assessed as a part of its "railroad track." In *Chicago, B. & Q. R. Co. v. People*, supra, certain lots and parts of lots bought by the railroad company near its right of way in the city of Quincy, and intended to be used for depot purposes in the future if the purchase of other property could be made, was held not to be "railroad track." The court say (page 665, 136 Ill., and page 202, 27 N. E.): "Even if the title to the residue of the site for the proposed passenger station had been acquired and the station built, that alone would not necessarily constitute the lots in question a part of the appellant's 'railroad track.' Where stations and other improvements are erected on the right of way of a railroad company, they may be regarded as a part of the 'railroad track,' within the meaning of section 42 of the revenue law; but section 46 clearly contemplates the possibility of stations and other buildings and structures of railroad companies not being on their right of way, and therefore not a part of their 'railroad track.' No railroad tracks have ever been constructed upon the lots in question here, and there is no proof in the record that the appellant contemplates the construction of any of the tracks thereon."

There are several objections urged against this tax which are technical in their character, and do not affect the substantial justice of the tax. The record discloses the means whereby the amount of tax levied upon this tract can readily be separated from the tax levied upon the tract south of it; and the description of the premises, when taken as a whole, is sufficiently definite.

We are of the opinion that the real estate in question was not properly assessable as "railroad track," but that the same was assessable as "real estate other than that denominated 'railroad track,' " by the revenue law, and that the same was properly assessed as such by the local assessor.

The judgment of the county court will therefore be affirmed. Judgment affirmed.

FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, Plff.
in Err., v. WILLIAM H. REYNOLDS, as Comptroller of the
State of Florida, and John A. Pierce, as Sheriff
of Leon County.

(Argued November 5, 6, 1901. Decided January 6, 1902.)

[22 Sup. Ct. Rep. 176.]

Equal Protection of the Laws—Assessment of Railroad Property for Omitted Taxes.*

Railroad companies are not denied the equal protection of the laws

*The authorities on the points discussed by the court will be found collected in the opinion.

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by Fla. Laws 1885, chap. 3558, requiring the comptroller to assess the taxes for 1879, 1880, and 1881 upon such railroad property as had escaped taxation for such years, without providing for the assessment of taxes for those years on other property not previously assessed therefor, general legislation having provided that railroad property should be assessed by the comptroller and real estate by the county treasurer.

In Error to the Supreme Court of the State of Florida to review a decision which effected the dismissal of a bill to restrain the collection of taxes. Affirmed.

See same case below, 28 So. 861.

Statement by MR. JUSTICE BREWER:

The constitution of Florida of 1868, art. 16, § 24, as amended by art. 11 of the amendments of 1875, is as follows:

“The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be held and used exclusively for religious, educational, or charitable purposes.”

Sec. 26, chap. 3413, of the laws of Florida, 1883, reads:

“If any assessor, when making his assessments, shall discover that any land in his county was omitted in the assessment roll of either or all of the three previous years, and was then liable to taxation, he shall, in addition to the assessment of such land for that year, assess the same separately for such year or years that may have been so omitted, at the just value thereof in such year, noting distinctly the year when such omission occurred; and such assessment shall have the same force and effect as it would have had if made in the year the same was omitted, and taxes shall be levied and collected thereon in like manner and together with the taxes of the year in which the assessment is made; but no lands shall be assessed for more than three years' arrears of taxes, and all lands shall be subject to such taxes omitted to be assessed, into whosoever hands they may come.”

In 1885 this statute was passed:

“Sec. 1. That in all cases in which any railroad or the properties thereto belonging or appertaining in this state, in the tax years commencing March 1, 1879, 1880, and 1881, or any of such years, were not assessed for taxes for such years, it shall be the duty of the comptroller to cause the same, or so much thereof, as were not assessed, to be assessed for state and county taxes, and 20 per centum of the taxes so assessed for said years and now unpaid shall be collected at the same time the taxes for the year 1885 shall be assessed and collected, and each year thereafter an additional 20 per centum of said taxes shall be collected at the same time and in the same manner as the taxes for such year are collected, until the whole amount of said unpaid taxes for the years 1879, 1880, and 1881 are paid.

“The taxes to be assessed under this act shall be the same in amount as they would have been had they been assessed in

such years or any of them as to which there was a failure to assess." Laws of Florida 1885, chap. 3558.

This statute was followed in 1891 by one in these words:

"Sec. 1. That the state and county taxes assessed by the comptroller of the state of Florida, upon any railroads and the properties thereof in said state, for the years 1897, 1880, and 1881, under and in pursuance of 'An Act to Provide for the Assessment and Collection of Taxes on Railroads and the Properties Thereof for the Years 1879, 1880, and 1881, as to Which There Was no Assessment,' but which have not been collected, shall be collected, and the payment thereof enforced at the same times and in the same manner as is now or may hereafter be provided by law for the collection and the enforcement of the payment of taxes assessed upon the railroads and the properties thereof in the state of Florida." Laws of Florida, 1891, chap. 4073.

The assessment of railroad property in Florida was not made by the county assessors, but by the comptroller of the state. Acts State of Florida, 1879, chap. 3099, §§ 45, 46.

The plaintiff is a corporation organized under the laws of Florida on November 17, 1888, and was the owner of several lines of railway which, on May 1, 1889, it acquired from the Florida Railway & Navigation Company, under foreclosure proceedings. The Florida Railway & Navigation Company was organized on February 29, 1884, by the consolidation of several companies, and on July 1 of that year it placed upon its properties a trust deed to secure the payment of \$10,000,000 bonds.

This bill was filed November 2, 1892, in the circuit court of the second judicial circuit of Florida, in and for the county of Leon. Its purpose was to restrain the collection of certain taxes, and to recover other taxes paid under protest. After three appeals to the supreme court of the state (35 Fla. 625, 17 So. 902, 39 Fla. 243, 22 So. 697, 28 So. 861), the final outcome of the litigation was a decree dismissing the plaintiff's bill in toto.

Messrs. Frederic D. McKenny, Wayne MacVeagh, T. L. Clark, and John A. Henderson for plaintiff in error.

Messrs. William B. Lamar and George H. Lamar for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court:

No question is presented concerning the claim for the taxes paid under protest, counsel for plaintiff stating in their brief that "the sole relief sought in this court is to obtain a reversal of the decree of the state supreme court, in so far as it reversed the decree of the circuit court enjoining the sale of complainant's lines of railroad for the taxes assessed for the years 1879, 1880, and 1881, such taxes amounting to \$96,181.69;" and in re-

spect to this matter they sum up their contention in these words:

“By the law of 1885 the state attempted to authorize the assessment of taxes for 1879–1881, but only upon property belonging to railroad companies, though it appears from the record that other properties of like class, i. e., real estate belonging to individuals and owners, not railroad companies, had not been assessed for taxes for such years.

“It surely cannot be ‘due process of law’ for the state of Florida in 1885 to arbitrarily impose a burden theretofore unheard of upon security holders who in 1884 had invested their money upon the faith of a title then clear of such burden.

“It surely cannot be less than a denial of the equal protection of the laws for the state of Florida in 1885 to impose burdens theretofore unheard of upon the property of railroad companies which under the laws of Florida is real estate, while permitting other real estate, otherwise owned, to escape such burdens.”

The decision of the supreme court of the state establishes that these proceedings are not in conflict with the Constitution of Florida. The single question, therefore, to consider, is whether there is anything in the Federal Constitution which forbids a state to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property. It will be perceived that there was no new levy of taxes. No act of the legislature was passed imposing an additional burden upon the property of the state in general, or upon any particular property, but the case is one in which, general levies having been made for the years named, certain property which ought to have paid taxes under them—and thus contributed its share of the expenses of the state—failed to do so, and the effort is to compel that property to discharge its obligation. The objection is not that the property ought not during those years to have paid its proportion of the taxes, but that it ought not now to be compelled to pay such proportion, because certain other property was similarly situated, and no effort is made to compel payment from it.

The fault, if fault there be, is one of omission rather than commission. The act of the legislature is not a mandate to a single officer, charged with the duty of assessing all property, to assess certain property, and to omit to assess the rest; but the general legislation having provided that railroad property should be assessed by the comptroller and real estate by county assessors, the act simply directed the comptroller to discharge the duties of assessment as to the property committed to his care, and omitted any direction to the county assessors. This omission, it is contended, makes the act

unconstitutional. In other words, the legislature may not pass an act directing one officer to discharge his duty unless it couples therewith a direction to other officers charged with kindred duty to perform theirs. It would seem to follow that if the legislature had on the same day passed another act with like command to the county assessors, the two acts together would be constitutional, though each standing alone would not be; and as the time of its passage is not generally of the essence of a statute, it would also seem to follow that if the legislature should to-day pass an act directing the county assessors to assess delinquent real estate for those years, this late enactment would give constitutional vitality to that passed years ago. How far can this theory of the constitutionality be sustained?

It must be remembered that "taxes are not debts in the ordinary sense of that term;" that they are "the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs." Cooley, Taxn. 1st ed. pp. 13 and 1. They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the state, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation.

No question of bona fide purchase arises, for it was held by the supreme court that, inasmuch as no assessment of this railroad property had been made during the years named, and no lien thereon for taxes established, a bona fide purchaser would have taken it free from any liability for such taxes; but it was also held that the present owner was not a bona fide purchaser, and this being a local matter the decision is conclusive upon this court.

The question how far the provisions of the 14th Amendment interfere with a state's system of taxation has been more than once before this court. It was very carefully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, and the general rule thus stated by Mr. Justice Bradley on page 237, L. Ed. p. 895, Sup. Ct. Rep. p. 535:

"The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different

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specific taxes upon different trades and professions, and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only, and not tax securities for payment of money. It may allow deductions for indebtedness, or not allow them. . . . We think that we are safe in saying that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation.”

It is well known that the states vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. In some there are general exemptions of particular classes of property, such as property used for religious, educational, and benevolent purposes. Some, in order to encourage certain industries, such as manufacturing, make either general or special exemptions. Some think it for their best interest to derive their revenues from personal property, corporations, and licenses, and exempt real estate. In some contracts for exemption are authorized by the state Constitution; in others they are forbidden. Now, considering the great diversity in these systems, it would obviously have worked a marked revolution if the 1st section of the 14 Amendment had been construed as compelling a cast-iron rule of equal taxation. It was not intended, as held in the case quoted from, and also in *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357, to restrain the legislature from any proper and legitimate classification, both as respects property for taxation and the methods of assessment and taxation. Doubtless it would prohibit a state from selecting some obnoxious person, and casting upon his property the sole burden of taxation, or a burden differing from that cast upon others whose property was similarly situated; but it does not prevent a state from exercising its judgment as to the property to be taxed and the modes of taxation, providing all property similarly situated is treated in the same way.

Besides those just cited, other cases in this court affirm the same propositions. In *Delaware Railroad Tax*, 18 Wall. 206, sub nom. *Minot v. Philadelphia, W. & B. R. Co.*, 21 L. Ed. 888, a special act of the state of Delaware imposing a tax of 3 per cent. upon the net earnings or income received by railroad and canal companies from all sources was sustained, the court saying (p. 231, L. Ed. p. 896):

“The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legis-

lature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.”

In *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593, a tax upon the corporate franchise or business of corporations, graded according to the dividends declared by the corporation, was sustained, the court, on p. 606, L. Ed. p. 1031, Sup. Ct. Rep. p. 597, referring in these words to the objection that the tax was in conflict with the 14th Amendment.

“But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed the greater part of all legislation is special either in the extent to which it operates or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. *Barbier v. Connolly*, 113 U. S. 29, 32, 28 L. Ed. 924, 925, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. Ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463, 466, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. Ed. 107, 109, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32, 32 L. Ed. 585, 587, 9 Ct. Rep. p. 937.

In *Giozza v. Tiernans*, 148 U. S. 657, 37 L. Ed. 599, 13 Sup. Ct. Rep. 721, a difference in the amount of license required from parties carrying on different kinds of business was the ground of attack upon a state statute, but the statute was sustained, and in respect to the 14th Amendment it was said (p. 662, L. Ed. p. 602, Sup. Ct. Rep. p. 723):

“Nor in respect of taxation was the amendment intended to compel the state to adopt an iron rule of equality, to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co.*

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v. Seibert, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250. And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225, 11 Sup. Ct. Rep. 577."

In *King v. Mullins*, 171 U. S. 404, 43 L. Ed. 214, 18 Sup. Ct. Rep. 925, a discrimination in the laws of West Virginia as to the matter of forfeiture in tax proceedings between the owners of tracts of less than 1,000 acres and those owning larger tracts was challenged, but the court overruled the contention, saying (p. 435, L. Ed. p. 226, Sup. Ct. Rep. p. 937):

"Another point made by the plaintiff in error is that the provision of the Constitution of Virginia exempting tracts of less than 1,000 acres from forfeiture is a discrimination against the owners of tracts containing 1,000 acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remedied by the Constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands patented in the last century or early in the present century to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed as to small tracts. The judiciary should be very reluctant to interfere with the taxing system of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws."

See also *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740, 18 Sup. Ct. Rep. 340. Text-books affirm the same doctrine. *Burroughs, Taxn.* § 56, says: "The rule is that the legislature may select the subjects of taxation in their discretion;" and in *Cooley, Taxn.* chap. 6, p. 124, it is said: "There is no imperative requirement that taxation shall be equal. . . . The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation. This is legislative, and the legislative conclusion in the premises must be accepted as proper and final."

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Gilman v. Sheboygan, 2 Black, 510, 17 L. Ed. 305, is not in conflict with these views. True, in that case a tax levied for a special purpose by the city was adjudged void on the ground that it was levied exclusively on real property, but the decision was placed upon a conflict with the Constitution of the state as interpreted by its supreme court. In other words, the supreme court of the state having in several cases held that such a discrimination avoided a tax, this court simply followed those decisions, saying (p. 518, L. Ed. p. 309) that it considered itself "bound in cases like this to follow the settled adjudications of the highest state court giving constructions to the Constitution and laws of the state."

In the light of these decisions, if the state of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the 14th Amendment, even though thereby the burden of taxation upon other property in the state was largely increased. Indeed that was the policy of the state prior to the Constitution of 1868. And, conversely, if the state had subjected railroads to taxation, while exempting some other class of property, it would be difficult to find anything in the 14th Amendment to overthrow its action. The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of state policy, to be determined by the state; and the Federal government is not charged with the duty of supervising its action.

If the state, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it. It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small, and not worth the trouble of special provision therefor. If taxes are to be regarded as mere debts, then the effort of the state to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution. In *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. Ed. 247, 16 Sup. Ct. Rep. 83, legislation of Minnesota for the collection of delinquent taxes on real estate was challenged because of a lack of similar legislation in respect to personal property, but the challenge was overruled, the court saying (p. 539, L. Ed. p. 252, Sup. Ct. Rep. p. 88):

"This statute rests on the assumption that, generally speaking, all property subject to taxation has been reached, and

aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature, in view of the probabilities of changes in the title or situs of personal property, might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the supreme court of the state."

Our conclusion is that, so far as the Federal Constitution is concerned, the legislature of Florida had the power to compel the collection of delinquent taxes from the railroad companies for the years 1879, 1880, and 1881, even though it made no provision for the collection of delinquent taxes for those years on other property. The judgment, therefore, of the Supreme Court of Florida is affirmed.

MR. JUSTICE BROWN dissenting:

I have no doubt whatever of the validity of the act of the legislature of Florida of 1883 requiring the assessor, upon discovering that any land in his county was omitted from the assessment roll of the three previous years, to assess the same for such years, since this was a provision applicable to all real estate in his county omitted from the assessment rolls for such years. But the act of 1885 did not proceed upon this basis. It arbitrarily selects railroad properties from all other species of property, and requires their assessment for another three years prior to the three covered by the act of 1883, and thereby, as it seems to me, denies them the equal protection of the laws. Under the act of 1883 all owners of real property omitted from the assessment rolls of the three previous years were put upon an equality, and made debtors to the state for the taxes of those years; but to segregate railroads from all other delinquent property, and tax them for another three years, as is done by the act of 1885, seems to me to open the statutes to the criticism of the court, wherein it is said: "Doubtless it" (the 14th Amendment) "would prohibit a state from selecting some obnoxious person, and casting upon his property the sole burden of taxation or a burden differing from that cast upon others whose property was similarly situated."

It appears quite immaterial that under the act of 1883 the property was to be assessed by the county assessors, and in the act of 1885 by the state comptroller. The wrong done to the railway company is not in the selection of an agent to collect the taxes, but in the selection of a specially odious tax, namely for antecedent years, and imposing it upon one class of delinquents alone. If, for instance, a license tax varying in amount were imposed upon a dozen different occupations, and by another act subsequently passed were made retroactive for

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three years, could the legislature by still another act, made applicable only to those employed in one out of these twelve occupations, made such act retroactive for another three year, without denying to those engaged in that occupation the equal protection of the laws?

I do not wish to be understood as saying that the state may not impose a specific and even a discriminating tax upon railways, but after the liability to the state of all real property owners has once been established, and all placed upon the same footing, I do not think a particular species of property can be arbitrarily taken and subjected to a discriminating tax for a series of years, during which, and upon the ground that, the state officers had neglected their duty. If state railway taxes may be made retroactive for three years, and again for another three years, I see no reason why this method of taxation may not be continued indefinitely so long as any property remains from which it may be collected. This kind of discrimination seems to be measurable only by the rapacity of the legislature.

LOUISVILLE BRIDGE CO. v. CITY OF LOUISVILLE.

(*Court of Appeals of Kentucky, Dec. 19, 1901.*)

[65 S. W. Rep. 814.]

Railroad Bridge Subject to Municipal Taxation.*

Under Const. § 174, a railroad bridge within the limits of a city is subject to city taxation, though it derives no benefit from the city government.

Same—Right of Action to Enforce Collection.

While a city may not, without express legislative authority, maintain an action to recover taxes, the statute authorizing actions for the recovery of taxes applies to the recovery of taxes from a railroad bridge company upon its structure; it being manifest from the statute as a whole that such a structure is considered a part of a railroad for the purpose of the collection of taxes.

Collection of Franchise Tax.

Ky. St. § 2998, giving to a city of the first class for the collection of tax bills all the remedies given for the recovery of debt, applies to the recovery of franchise taxes, though the assessment is made by the state board of valuation and assessment, as the duty of making out the tax bills devolves on the same officer who makes out the tax bills from the assessment made by the local assessor.

Validity of Assessment of Franchise Tax.

It constitutes no objection to the assessment of a franchise tax that the clerk of the state board of valuation and assessment figured out the value, as he did so in accordance with directions given by the board and under its supervision.

Same—Certification.

Where notice of the assessment made by the board was sent by the

*See generally, 7 Rap. & Mack's Dig. 834 et seq.; 6 Id. 753 et seq.; 25 Am. & Eng. Enc. Law (2d Ed.) 650 et seq.

As to the liability of railroad right of way and roadbed to assessment for local improvements, see *Kansas City, etc., Ry. Co. v. Board of Waterworks* (Ark.), 20 Am. & Eng. R. Cas., N. S., 265, and note, 268 et seq.

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corporation clerk in the auditor's office under his direction to the clerk of the county court by mail, there was a sufficient certification by the auditor.

Res Judicata.

A judgment for defendant in an action to recover taxes for one year is not a bar to a subsequent action under the same law to recover taxes for another year.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the city of Louisville against the Louisville Bridge Company to recover taxes. Judgment for plaintiff, and defendant appeals. Affirmed.

C. H. Gibson, H. M. Lane, and Hazelrigg & Chenault, for appellant.

Henry L. Stone, for appellee.

BURNAM, J. Appellee, the city of Louisville, instituted four suits in the Jefferson circuit court against the Louisville Bridge Company for the recovery of the tax assessed by the state board of valuation and assessment upon their corporate franchise for the fiscal years 1894, 1895, 1896, and 1897, and also for the tax assessed against their tangible property by the city assessor for the fiscal years 1895 and 1896, respectively. The only defense to the tax upon the tangible property of the company, which consists of its bridge structure and other physical property, is based upon the idea that the bridge did not receive any benefit from the municipal government, and was exempt from taxation, upon the same theory that agricultural lands situated within the corporate limits of cities were held in cases of *Cheaney v. Hooser*, 9 B. Mon. 330, and *City of Covington v. Southgate*, 15 B. Mon. 491, to be exempt. This same point was made and relied on in the suit between these same parties, and was decided against their contention, in the opinion reported in 58 S. W. 598. It was there held that section 174 of the constitution had changed the rule of taxation as announced in that class of cases, and that they were liable for the tax. Under the rule laid down in that case and in the previous cases of *Henderson Bridge Co. v. City of Henderson*, 36 S. W. 1132, and *Same v. Com.*, 31 S. W. 486, we think it clear that appellee was entitled to judgments for its tax upon the tangible property of appellant for the years 1895 and 1896, if the court had jurisdiction to render the judgment.

Appellant relies upon several distinct grounds for the reversal of the personal judgment rendered against it for the amount of the franchise tax sued for. First, it is insisted that there is no express legislative authority authorizing the city of Louisville to institute or maintain a suit for the recovery of the tax, and that in the absence of such legislation no such suit can be maintained; and in support of this contention we are referred to the cases of *Baldwin v. Hewitt*, 88 Ky. 673, 11

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S. W. 803, Louisville Water Co. v. Com., 89 Ky. 244, 12 S. W. 300, 6 L. R. A. 69, McLean Co. Precinct v. Deposit Bank of Owensboro, 81 Ky. 257, and Grand Rapids School Furniture Co. v. Trustees School Dist. 29, Pike Co., 44 S. W. 98. The decisions in all these cases are based upon the theory that the legislature was charged with the duty of providing a method of levying and collecting taxes, and that in the absence of express legislative authority a court of chancery is powerless. These opinions are evidently decisive of the question. It therefore only remains for us to determine whether such legislative authority actually existed. Section 4102 of the Kentucky Statutes, which is a section of article 4, which treats of the assessment of and payment of taxes by railroads, provides: "The same rate of taxation for state purposes, which is or may be in any year levied on other real estate, shall be and is hereby levied upon the value so found by said board of the railroad, rolling stock, and real estate of each company; and the same rate of taxation for purposes of each city, town, county, part of county or taxing district of any kind in which any portion of any railroad is located, which is or may be in any year levied on other real estate therein, shall be and is hereby levied on the value of the real estate of said company therein." And the same section further provides: "Where railroad bridges, spanning any river which constitutes the boundary or state line of the commonwealth, shall be assessed as of the counties in which they are located, and local tax derived therefrom shall be applied to each city, town, county, or taxing district in which said bridges are or may be located." And section 4104 provides that: "Taxes, penalties and interest due the commonwealth from any railroad company may be recovered by the auditor of public accounts by action in the name of the commonwealth in the Franklin circuit court, and those due any county, city, incorporated town or taxing district may be recovered by the officer authorized to receive the same by action in the name of the commonwealth in any court of competent jurisdiction."

In construing this section in Henderson Bridge Co. v. City of Henderson, 90 Ky. 498, 14 S. W. 493, it was held that the city of Henderson could maintain a suit for the recovery of taxes alleged to be due by the Henderson Bridge Company; the court saying: "A railroad bridge company, at least for the purpose of collecting taxes, should be considered as a part of a railroad, and consequently fell within the principle announced in Elizabethtown & P. R. Co. v. Trustees of Elizabethtown, 12 Bush, 239." And this conclusion is a fair deduction from the language of the statute taken as a whole. If otherwise, it is impossible to suggest a reason why these two classes of corporations should have been coupled in the section. And section 4021 of the statutes provides: "The commonwealth, each county, incorporated city, town, and taxing district shall have a lien on the property assessed for

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taxes due them respectively, which shall not be defeated by any gift, sale or alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien." And the same section provides that, where any lands or improvements shall not be assessed in any one year, "it must be assessed retrospectively in the manner provided by law for that year at any time not later than five years thereafter." And section 2996 of appellee's charter directs that "the city assessor shall make out the tax bills according to the provisions of the ordinance of the city levying taxes for the corresponding year, * * * and shall list such bills for collection with the tax receiver by the 3d day of January following" or as soon thereafter as practicable. And section 2998, also a section of appellee's charter, provides that "all uncollected tax bills, which remain in the hands of the tax receiver on the 1st day of May succeeding the date on which they were listed with him for collection against any person owning property in his own right, * * * shall be deemed a debt from such person to the city, arising as by contract, and may be enforced as such, by all the remedies given for the recovery of debt, in any court of the commonwealth otherwise competent for that purpose."

Under these various decisions, and for the reasons herein indicated, we are of the opinion that the judgment appealed from must be affirmed; and it is so ordered.

SUBURBAN R. CO. v. METROPOLITAN WEST SIDE EL.
R. Co.

(*Supreme Court of Illinois, Dec. 18, 1901.*)

[61 N. E. Rep. 1090.]

Right of Way—Right to Condemn Right of Way for Connecting with Tracks of Another Company.

Where a street railway company has procured a right of way to connect its track with the track of another company, the latter cannot condemn and take such right of way to connect its track with a rival company.

Street Railways—Duty to Unite in Forming Connection with Tracks of Another Company.

Where a street railway company desires to connect its track to that of another company, the latter is required to unite in forming the connection; and, if they cannot agree on the details and compensation, they are to be ascertained in accordance with the provisions of 3 Starr & C. Ann. St. 1896, p. 3235.

Same—Right to Connect with Tracks of Another Company as Affected by Absence of Ordinance.

Where a street railway company has acquired a right of way to connect its track with that of another company, its right to hold such right of way is not affected by the fact that there is no ordinance giving it a right to lay its track over one-half the width of a street, next to the track of such other company.

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Error to circuit court, Cook county; R. S. Tuthill, Judge.

Proceeding by the Metropolitan West Side Elevated Railroad Company for condemnation of a portion of the right of way of the Suburban Railroad Company. From a judgment authorizing such taking, the Suburban Railroad Company brings error. Reversed.

Clarence A. Knight, Walter L. Fisher, and William G. Adams, for plaintiff in error.

Addison L. Gardner and Francis W. Walker (William W. Gurley, of counsel), for defendant in error.

CARTWRIGHT, J. The parties to this writ of error are both corporations of this state organized under the general railroad law, and the question involved is whether the defendant in error can lawfully take and appropriate to its use, by the right of eminent domain, property acquired by plaintiff in error for the same public use. Defendant in error owns and operates an elevated railroad in the city of Chicago, built and operated for a time by another company, and acquired by defendant in error through a foreclosure and sale. The city council of Chicago authorized the company that built the road to construct it and cross streets and alleys from the center of the city to the western limit thereof, which was the center of West Forty-Eighth street. Adjoining the city on the west was the town of Cicero, and its eastern boundary was said center line of West Forty-Eighth street. The company built and operated the road to the east line of said street, at a point one-half block south of Harrison street. Plaintiff in error, the Suburban Railroad Company, owns an electric surface railway running in Harrison street through the town of Cicero. It was authorized, by an ordinance passed July 18, 1895, to construct its railway in Harrison street from the center line of said West Forty-Eighth street to the west line of said town of Cicero. The ordinance of the town of Cicero was amended from time to time so as to permit the Suburban Railroad Company to extend its line from Fiftieth street, between Harrison and the north line of the alley in the adjoining block, and to construct an inclined connection to the elevated road on West Forty-Eighth street. There were negotiations between the companies for connections between the two roads by means of such inclined tracks, but no agreement was reached; and the foreclosure suit was begun against the elevated railroad company on January 20, 1897, and a receiver was appointed, who declined to continue the negotiations. In April, 1897, the Suburban Railroad Company commenced a condemnation suit to acquire the right of way through the block west of Forty-Eighth street from the terminus of the elevated railroad. On July 7, 1897, the Ogden Street Railroad Company obtained an injunction against the construction of the Suburban Railroad Company of its proposed inclined connection across said Forty-Eighth street. The condemna-

tion proceeding still remains pending of record, but was dismissed by agreement on January 28, 1898, as to Charles F. Swigart, one of the defendants. The injunction against building the incline was in force until May 4, 1899, when the bill was dismissed. Pending the negotiations for the connection, a temporary agreement was made on March 27, 1899, by which the Suburban Railroad Company operated its cars over the Ogden Street road from Harrison street to a point opposite the terminal station of the elevated road at Forty-Eighth street, filling the gap of half a block between the two roads temporarily by that means. The present elevated railroad company was unable to agree upon the terms of the proposed inclined connection. Between May 29 and June 27, 1900, the Suburban Railroad Company acquired, by purchase for its right of way, for the purpose of extending its line to the terminus of the elevated road and making the connection, all the property necessary except that owned by Swigart. It consists of a 30-foot right of way running east and west through the middle of the block between West Forty-Eighth street and West Fiftieth street, except said property owned by Swigart, and connects with the tracks of the Suburban Railroad at Harrison street. In the spring of 1900 another electric surface railroad company was authorized to build a railroad from the west as far east as West Fifty-Second street. This was the Aurora, Wheaton & Chicago Railroad Company, and the elevated railroad company formed a scheme to build an incline from its elevated structure at Forty-Eighth street to reach the surface east of said Fifty-Second street, so as to form a connection there with said Aurora, Wheaton & Chicago Railroad. After the Suburban Railroad Company had purchased all the property now in controversy, an ordinance was passed by the city council of the city of Chicago, to which the territory had then been annexed, authorizing the elevated railroad company to extend its road from West Forty-Eighth street to West Fifty-Second street. The elevated railroad company accepted this ordinance July 16, 1900. The Suburban Railroad Company had formally located its railroad over said right of way, and opened negotiations with Swigart for the strip in the west end of the block belonging to him. On September 12, 1900, the elevated railroad company located its railroad over the same right of way. By a deed dated September 22, and recorded September 24, 1900, Charles F. Swigart conveyed his property to Joseph W. Kadish, and Kadish quitclaimed it September 24, 1900, to Hermann Benze. Plaintiff in error commenced a condemnation suit against Kadish and Benze to ascertain the compensation to be paid for the property for its right of way on September 26, 1900, and on the next day laid temporary tracks on the right of way it had already acquired. On September 28th the elevated railroad company put on record a quitclaim deed from Benze to it, dated September 25, 1900. On September

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28, 1900, the elevated railroad company commenced its suit in the circuit court of Cook county against the Suburban Railroad Company for the purpose of taking and appropriating to its use, for its proposed inclined tracks, the right of way and property so acquired and owned by the Suburban Railroad Company. The Suburban Railroad Company moved to dismiss the petition on the ground that the property sought to be appropriated to a public use was already devoted by it to the same use for its right of way, and it also filed a traverse of the averments of the petition. The court heard the motion to dismiss and the issue of fact raised by the traverse, and found against the Suburban Railroad Company and denied its motion to dismiss. A jury was impaneled and sworn, and a witness testified to the value of the property, and judgment was entered authorizing the elevated railroad company to take the right of way upon payment of the compensation awarded. The writ of error in this case was sued out to review that proceeding.

The defendant had a right to locate and build its road, either on the surface or by an incline, over the right of way in question; and it had acquired a right from the municipality to construct its road on the incline to the center of West Forty-Eighth street. It had purchased for that purpose the right of way which is sought to be taken away from it by the condemnation suit. The purpose of the suit is to deprive the defendant of such right of way and to appropriate it to the use of the petitioner, so that it may erect thereon a double-track incline to the surface of the ground, substantially like the one proposed by the defendant. The purpose to which the petitioner proposes to devote the property is in law precisely the same as the purpose for which it is already held by the defendant. To vest title in the petitioner would be nothing more nor less than a mere change of ownership for the same public use, so that the incline and tracks would be owned by the petitioner, rather than the defendant. The defendant had acquired the property sought to be taken before the petitioner took any proceeding to extend its line over the territory, and had filed a petition for condemnation against the only parties in whom the title remained of record, before this proceeding was begun. It had located its road upon the property and laid temporary tracks on the right of way. The evidence shows that the proceeding on the part of the defendant was in good faith, and that plans had been matured and adopted, and materials especially adapted to the construction had been manufactured.

The lands of railroad corporations, not necessary for any purpose of the corporation or the enjoyment of its franchise, are subject to be taken under the law of eminent domain, the same as lands of individuals. This was decided in *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174, where one corporation obtained a lease of land neither in use nor nec-

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essary for any purpose of the corporation, but with a view of obstructing the other corporation in the enjoyment of its franchise; and also in *Chicago W. D. Ry. Co. v. Metropolitan W. S. El. R. Co.*, 152 Ill. 519, 38 N. E. 736, where property used for a horse barn was condemned for a different use. But one corporation cannot take the property of another already devoted to a particular use for the purpose of applying it to the same use. Where there is no change in the use, there cannot be a change in ownership, under the law of eminent domain. *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589. In this case the proposed use is the same. It appears that petitioner desires to connect with another surface railroad at Fifty-Second street, and it is doubtless desirable to run across this property for that purpose without deflecting from the direction of its original line. There is, however, no physical obstacle to its taking another route and reaching the surface without taking this 30-foot strip. Even in a case where there was no other way to build a railroad, it was held that one corporation could not take any part of the right of way of another company, except for the purpose of a connection or intersection. *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.*, 122 Ill. 473, 13 N. E. 140. In that case there was an attempt to condemn for railroad purposes a part of a right of way between the rocky bluffs and the eastern bank of the Mississippi river, where there was a physical impossibility of building a road elsewhere. It was decided that there was no right to condemn longitudinally even a part of such right of way necessary for the construction of the new road. There is no such obstacle in this case, but the obvious purpose is to deprive the defendant of its rights in the premises and transfer them to the petitioner. The law does not permit the petitioner to take the property for its benefit from the defendant, which was proceeding, as far as the record shows, in absolute good faith to build its road on the property. The statute authorizes the defendant to make a connection with the petitioner's road upon the grounds of petitioner with necessary conveniences, and petitioner is required to unite in forming the connection and granting the necessary facilities therefor; and, if the two corporations cannot agree upon the compensation to be made and the points and manner of the connection, the same is to be ascertained in the manner prescribed by law. 3 Starr & C. Ann. St. 1896, p. 3235. The right to form such a connection may be obtained by procedure under the eminent domain act. *East St. Louis & C. Ry. Co. v. Belleville City Ry. Co.*, 159 Ill. 544, 42 N. E. 974.

It is argued that the defendant would have no right to condemn under the statute for the connection with the petitioner's road, because it has no ordinance giving it the right to cross the east half of Forty-Eighth street. That fact does not affect the right of defendant to condemn the Swigart property or to hold the property it has acquired. The defendant could select

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its own route, and would have a right to construct its road, whether it formed any connection with the petitioner or not. It could not construct the road across the east part of Forty-Eighth street without the assent of the municipality; but it may, without such assent, acquire the right of way and construct its road on every part of the line, except across that half of the street. Its right of way cannot be taken from it by the petitioner on the ground that it has not yet gotten something else that it may need in the future. It is not a condition to a condemnation of property that a license should have been previously obtained from the city to locate or construct the railroad across a street. The consent may be obtained afterwards, and it is immaterial when it is secured. *Metropolitan City Ry. Co. v. Chicago W. D. Ry. Co.*, 87 Ill. 317; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110. If the petitioner builds across Forty-Eighth street, as its plans contemplate, there will be no necessity for defendant to cross the east part of the street to make the connection; and, at any rate, the question of a license to cross is between the municipality and the defendant, and the fact that a license has not yet been granted does not nullify the steps already taken or operate as a forfeiture of defendant's rights. In our judgment the ruling of the circuit court was wrong.

The judgment is reversed, and the cause is remanded to the circuit court, with directions to sustain the motion of defendant and dismiss the petition.

Reversed and remanded.

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(*Supreme Judicial Court of Massachusetts, Suffolk, Jan. 1, 1902.*)

[62 N. E. Rep. 1.]

Street Railways—Repair of Streets—Surface and Paving—Excavations.*

Under Pub. St. c. 113, § 32, providing that street railway companies shall keep in repair the "paving, upper planking, or other surface materials" of the part of the street covered by their tracks, and in case of an unpaved street an additional space of 18 inches on each side of their tracks, it is not the duty of such a company to fill excavations below the surface level of the street, within 18 inches of its track, in an unpaved street, made by a sewer contractor by authority of the city; and, where injuries were sustained by reason of such an excavation, the street railway company was not liable.

Exceptions from superior court, Suffolk county; Albert Mason, Judge.

Action by Kate Leary against the Boston Elevated Railway Company and another. From a judgment in favor of defendant company, plaintiff brings exceptions. Exceptions overruled.

*See generally, 7 Rap. & Mack's Dig. 394 et seq.; 23 Am. & Eng. Enc. Law 983 et seq.

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J. E. Crowley, T. F. Hunt, and J. Lundy, for plaintiff.
Endicott P. Saltonstall, for defendant Boston El. Ry. Co.

HAMMOND, J. There are two defendants in this case,—the Boston Elevated Railway Company and a person named Connolly. The case came on for trial before the chief justice of the superior court, sitting without a jury, for the purpose of trying the question of the liability of the defendant first above named. At the trial the plaintiff asked a ruling that, as matter of law, “upon all the evidence the defendant corporation is liable.” This ruling was refused. The court found “no negligence on the part of the corporation,” and found for the defendant. The bill of exceptions is loosely drawn, but we interpret it as stating that the plaintiff excepted to the refusal to give the ruling requested, and to the special finding as not warranted by the evidence. A short answer would seem to be that, as the record does not expressly purport to bring before us all the evidence material to the questions raised, we cannot say that there was any error. The record, however, states certain facts, and the question which the plaintiff evidently desires to raise, and which both parties have argued, is whether, as matter of law, these facts necessarily show negligence on the part of the defendant corporation. It appears that the corporation owned and operated a street railway with tracks in the streets of the city of Boston, including the one where the accident occurred; that on or about August 25, 1899, an excavation had been made by some person, but not by the defendant corporation, or with its authority or permission, in this street, adjacent to and within 18 inches from the tracks; that on or about the said 25th day of August the plaintiff, being then in the exercise of due care, fell into the excavation within 18 inches of the track, and was injured; and that the defendant had made no attempt to guard the excavation, which was of such depth and width as to be dangerous to public travel, and had existed for some time prior to the day of the accident. Assuming, in favor of the plaintiff, that this was an unpaved street, the question is whether these facts are inconsistent with the special finding that the defendant was not negligent. It involves an inquiry into the nature of the duty imposed upon the defendant corporation with reference to the repair of streets through which its tracks run. In the early street railway charters it was specially provided that the companies should maintain and keep in repair such portions of the streets as should be occupied by their tracks. See, among many others, St. 1853, c. 353, § 3; chapter 383, § 3; St. 1854, c. 445, § 5; chapter 434, § 5. As these companies became numerous, similar provisions were incorporated into general laws applicable to them. St. 1864, c. 229, § 18; St. 1866, c. 286, § 1; St. 1871, c. 381, § 21. It is held that these statutes do not release the city or town from its statutory liability to the traveler, but simply made the railway company also liable to him, or

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answerable over to the city or town compelled to pay. The municipality is still primarily liable, although the traveler may proceed against it or the railway corporation. *Hawks v. Inhabitants of Northampton*, 116 Mass. 420, and cases cited; *Fowler v. Inhabitants of Gardner*, 169 Mass. 505, 48 N. E. 619; *Dobbins v. Railway Co.*, 168 Mass. 556, 47 N. E. 428. A radical change in the duty of street railway corporations as to the repair of highways was made, however, by St. 1881, c. 121, subsequently enacted in Pub. St. c. 113, § 32. This last statute provides that such a corporation shall keep in repair, to the satisfaction of certain officers therein named, simply "the paving, upper planking or other surface materials" of the part of the street covered by its tracks, and, in the case of an unpaved street, an additional space of 18 inches upon each side of its tracks. The railway corporation is no longer required, as formerly, to keep in repair the whole of that part of the street covered by its tracks, but only the surface thereof. This limited liability cannot be construed as imposing upon the corporation the duty of filling an excavation from the bottom. It is only when the excavation has been so far filled by the municipality or other party upon whom rests the general responsibility for the safety of the street as to reach the plane where surface material is required that the duty of the railway company begins, and it is only when its duty begins that it can be held answerable for the condition of the street, and then only to the extent of that duty.

It is stated upon the brief of the defendant that this excavation was a trench, made so as to come within 18 inches of the defendant's track by one Connolly, under a permit from the city of Boston, for the purpose of constructing a sewer in the street. If so, then the opening was legally made, and the defendant had no authority to close it; and while the trench was legally there the defendant was not charged with the duty of keeping in repair the portion of the street within the lines of the trench until it had been so far filled as to call upon the defendant to fix the surface. Until that time arrived, there was no surface to be cared for by the defendant, and the responsibility for the condition of the street and the duty of protecting travelers, either by guards or otherwise, were upon the city. As the facts reported are not inconsistent with such a state of things, the special finding is not shown to be wrong, and it follows that no error is shown to have been made as to that, or as to the manner in which the court dealt with the ruling requested.

Exceptions overruled.

RISCHE v. TEXAS TRANSP. CO.*(Court of Civil Appeals of Texas, Dec. 18, 1901.)*

[66 S. W. Rep. 324.]

Eminent Domain—Payment of Damages Not a Condition Precedent.

Under Const. art. 1, § 17, providing that no person's property shall be taken or damaged for a public use without adequate compensation, and, when taken, such compensation shall be first paid, the legislature may authorize acts for the public good that may result in damage to the individual without requiring as a condition precedent that damages be first paid.

Street Railways—Transportation of Freight—Right of Abutting Owner to Enjoin.

Where a corporation has obtained a charter under Rev. St. tit. 21, c. 2, authorizing the incorporation of street railway companies for transportation of freight and the sanction of the municipal authorities for the construction of the road, an abutting property owner cannot restrain such use of the street, or declare it a nuisance, though he owned the fee, and granted the land to the city for street purposes alone.

Same—Same—Same.

Where an abutting property owner seeks to restrain a street railway company incorporated for transportation of freight from operating its road because it is using heavy electric motors and hauling large quantities of freight, rendering access to his premises dangerous and inconvenient, and endangering the lives of his family and other persons using the street, the injunction is properly denied on the ground that the injury is not irreparable.

Same—Same—Additional Servitude—Right of Abutter to Recover Damages.*

The operation of a street railway for the transportation of freight, being a commercial railway, and subjecting the street to an additional servitude, entitles an abutting owner to damages for any injury inflicted on his property, not suffered in common with other property along the route.

Appeal from district court, Bexar county; John H. Clark, Judge.

Action by Earnest Rische against the Texas Transportation Company. From a judgment in favor of defendant, plaintiff appeals. Modified.

T. D. Cobbs and Denman, Franklin & McGown, for appellant.

Newton & Ward, for appellee.

FLY, J. This suit was originally instituted against the city of San Antonio, Otto Koehler, Otto Wahrmund, Oscar Bergstrom, John J. Stevens, the San Antonio Brewing Association, the Lone Star Brewery, and the Texas Transportation Company, but in an amended petition all of the defendants were dismissed from the suit except the last named. The object of the suit was to recover damages for the building and operating of a street railway for freight purposes on a certain

*See generally, *Guinn v. Ohio River R. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 437, and note, 444; 7 Rap. & Mack's Dig. 649 et seq.

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street on which the property of appellant abuts, and to enjoin the further operation of the railway. Appellee filed general and special exceptions to the petition, which were sustained by the court, and, appellant declining to amend, it was adjudged that he take nothing by his suit and pay all costs. Appellant alleged, in substance, that he was the owner of certain lots in the city of San Antonio, at the corner of Grand avenue and River avenue, and fronting on both streets; that in September, 1897, appellee constructed on said streets a street freight railway, and is operating the same, and that this was done by virtue of a charter obtained from the state of Texas, and under an ordinance duly enacted by the city of San Antonio granting a franchise to appellee to operate such railway. It was further alleged that heavy iron rails were used in constructing the track; that there is another railway track on said streets, and two trolley wires; that heavy electric motors have been placed on the track in question, and are being operated in transporting large refrigerator cars used by railroad companies for transporting beer; that appellee runs from four to six trains daily, which are composed of from three to fifteen cars in addition to the motor car; that such use is an additional servitude on such streets, and is a continuing nuisance and trespass; that in the construction of the road appellee has not occupied the center of the street, but has constructed its track within six feet of appellant's sidewalk, thereby rendering access to his residence dangerous and inconvenient, and appellant has been forced thereby to abandon the front entrance to his house; that the cars make great noise, and jar and shake his house, and the cars are run so rapidly as to endanger the lives of his family and other persons using the streets. Damages were prayed for, and an injunction against the further operation of the road.

It has been held by this court, and the ruling approved by the supreme court, that the railway being operated by appellee is for public purposes. *Mangan v. Transportation Co.* (Tex. Civ. App.) 44 S. W. 999. The constitution of Texas (article 1, § 17) provides that "no person's property shall be taken, damaged, or destroyed for, or applied to public use, without adequate compensation being made, unless by consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money." At the time this constitutional provision was adopted the rule seemed to be that the word "taken," as used in constitutions in this connection, should be confined to an actual taking of property, and that damages incurred by the owner of property indirectly or consequentially could not be recovered. The constitutional provision was undoubtedly enacted to meet this construction. *Railroad Co. v. Eddins*, 60 Tex. 656; *Railway Co. v. Fuller*, 63 Tex. 467; *Railway Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565. It follows from the constitutional provision that, if

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the use of the streets by appellee for the purpose of transporting freight from one point to another in the city of San Antonio imposes an additional servitude on the streets,—that is, puts them to a use not contemplated in their dedication and construction,—appellant is entitled to compensation for any damages that he may have sustained by such use of the streets; and if there was a “taking” of his property, as contemplated by the constitution, appellee should, in the absence of condemnation proceedings and compensation paid or secured, be restrained from such use of the streets. Whatever may be the enlarged scope given in definitions by courts to the word “taken” when used in constitutions in connection with the taking of private property for public uses, the constitution of Texas has in the provision hereinbefore copied confined it to its ordinary use, and it must be held to mean an actual “taking” in the physical sense of the word, damages arising from anything else than an actual taking being fully provided for in the section quoted. Keeping in view that the makers of the constitution were using the word “taken” in the sense of an actual physical appropriation, it is clear that when it provides that compensation shall be made or secured before the property is taken it has no reference to a case where property is damaged or destroyed, and one who has merely damaged property without actually appropriating it cannot be restrained from the use causing the damage because he had not made arrangements for compensation before the use was begun. What we have said would seem to be in conflict with some expressions in the case of *Railway Co. v. Fuller*, 63 Tex. 469, where it was held that operating a railroad along a street was a “taking,” and that, whether taken, damaged, or destroyed, compensation must be first made. These expressions were not necessary to the proper decision of the case before the court, and consequently cannot be binding as a precedent. No injunction was sought, the injured party merely suing for damages. The expressions referred to in the *Fuller Case* appear to be in conflict with the case of *Railroad Co. v. Odum*, 53 Tex. 353, where it is held that “the regulation or enlargement of the use of the street, the property of the state, is not a taking of property within the meaning of the constitution of 1869, although the lot owner may thereby suffer incidental inconvenience or injury.” The constitution of 1876 used the word “taken” in the sense that it was used in former constitutions and as defined by judicial interpretation, and then provided for damages not expressed in the former constitutions. It is clear that neither the legislature nor city council could authorize the taking of private property in any other than the constitutional way, but the legislature has the power to authorize acts for the public good that might result in damage to the individual without requiring as a condition precedent that all damages should be first paid. The legislature, having the power to do so, has granted the right

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to obtain charters to operate street railways for the carriage of passengers or freight, and, appellee having obtained a charter under authority of the statute, and the city of San Antonio, to whom exclusive control of the streets has been given by its charter, having given permission to appellee to lay its track and operate cars on certain streets, it is acting under lawful authority, and, having built its road properly, it cannot be a public nuisance, and an injunction should not be granted. There is no allegation that appellant owned the fee in the street, the only allegation on this point being the argumentative one that appellant owned the fee to the center of the street because he owned the abutting property, which does not follow. If he had alleged, however, that he owned the fee, and had granted the land to the city for street purposes alone, it would not alter the case presented by the record. The street is a public highway, and, no matter who owns the fee, the public easement is superior to the right of the individual. As said in *Halsey v. Railway Co.*, 20 Atl. 859, by the court of chancery of New Jersey: "Lands taken for streets are taken for all time, and, if taken upon compensation, compensation is made to the owner once for all. * * * The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the adjacent land as is prohibited by the constitution." It is not denied that appellee was authorized by its charter to operate a railroad for the transportation of freight, but, on the other hand, it is alleged that the charter for such purpose was granted under title 21, c. 2, of the Revised Statutes of Texas, and that an ordinance was duly enacted by the city of San Antonio granting a franchise to build such road, and that by virtue of such charter and such ordinance the road was built. The legislature having the power to grant such charter, and the city being empowered to pass such ordinance, the injunction prayed for was properly denied.

The injunction was also properly denied because the injury was not shown to be irreparable, and, if any case at all was made out by the allegations, it was only a right to recover damages, and not one to demand compensation. As said by the supreme court of the United States in *D. M. Osborne & Co. v. Missouri Pac. R. Co.*, 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155: "Where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damages in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid on the progress of a public work." There is no law in Texas for condemnation proceedings except in cases where lands are actually taken by railroads, and it cannot with force be contended that

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condemnation proceedings should be resorted to before the street could be used for the purposes intended. There being no provision for condemnation, it would seem clear that it is a case where the only way open to appellee was pursued, and appellant would be relegated to a suit for any damages he may have sustained. The question, then, arises as to whether appellant is entitled to damages arising on account of the construction and operation of the railway. If the railway in question can be classed as a street railway in contradistinction to a commercial railway, then, under the general doctrine of the courts of this and most of the other states of the Union, appellant would not be entitled to damages on the ground that streets can be legitimately used by the street railways, whatever the motive power, if they are properly constructed. *Railway Co. v. Limburger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730; *Lewis, Em. Dom.* § 115h; *Halsey v. Railway Co. (N. J. Ch.)* 20 Atl. 859; *Rafferty v. Traction Co. (Pa.)* 23 Atl. 884, 30 Am. St. Rep. 763; *Nichols v. Railroad Co. (Mich.)* 49 N. W. 538, 16 L. R. A. 371. The question, then, arises, what is a street railway, and can the railway of appellee be placed in that class? It was first held that street cars drawn by horses, and used for the transportation of passengers from one part of a city to another, did not constitute an additional servitude on the streets. They were distinguished from steam railways in the rails and construction of the track, the speed at which they run, the noise and vibration produced, the smoke and steam emitted, the danger of frightening horses, the danger to life, and the size and weight of cars and locomotives. When the steam motor and electric cars were invented all the reasons given why horse railways were not an additional servitude to streets were ignored except that they must be carriers of passengers, and not of freight, from one point to another in a city. In one instance, at least, this last reason has been discarded, and it has been held that the streets can be used by railways whatever be the motive power, and for the carriage of both freight and passengers. *Montgomery v. Railway Co.*, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89. The weight of authority, however, is that a street passenger railroad, laid on the surface or established grade of a street, is a legitimate use, while all other railroads are not. *Lewis, Em. Dom.* § 115i; *Elliott, R. R.* §§ 6, 557; *Funk v. Railroad Co. (Minn.)* 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608. There has been no direct adjudication of this matter in this state, but there are several cases where damages have been allowed which have resulted from the construction of railroads along streets, and this could have been done only on the theory that they were an additional servitude to the street. *Railroad Co. v. Eddins*, 60 Tex. 656; *Same v. Bock*, 63 Tex. 245; *Railway Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565; *Same v. Fuller*, 63 Tex. 467; *Same v. Jennings*, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180. The

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railroads in question in the cases cited were steam railroads, but, as we have shown, this would not distinguish them from street railways, which may be operated by any motive power, and the decisions must be justified on the ground that the roads were the carriers of freight, which is all that distinguishes the commercial railway from the street railway. We conclude, therefore, that, as the railway of appellee was constructed and operated as a freight railway, it must be classed as a commercial railway, and, if an injury has been inflicted on the property of appellant, not suffered in common with other property along the route, he would be entitled under the constitution to damages. The allegations in the petition show damages to appellant's property not suffered in common with other property, and would, if proven, entitle him to damages.

The judgment sustaining exceptions to that part of the petition asking for an injunction will be affirmed, but will be reversed as to the exceptions sustained to the suit for damages, and will be remanded for a trial on that part of the petition.

On Motion for Rehearing.
(Jan. 29, 1902.)

In the case of Aycock v. Association, 63 S. W. 953, the identical points involved in this suit were passed upon by this court, and it was held that, "the use of the streets being one authorized by law, and consistent with the purposes for which streets exist, plaintiffs were not entitled to have such use restrained by injunction, or declared a nuisance." The supreme court refused a writ in the case, and must necessarily have been of the opinion that the language above quoted was the law. The street railway against which an injunction was sought in that case is the one against which it is sought in this case. It is immaterial whether appellee has any authority to exercise the power of eminent domain or not. If it had all the power with which it is possible to invest any railroad corporation, it could not condemn a street, but must enter upon it through the permission of the city that exercises exclusive control over it. If in doing this it has damaged appellant in a manner not common to all the property holders along the street, it must respond in damages for so doing, but it cannot be restrained from a use of the street sanctioned by the legislature of the state and permitted by the city council of the city of San Antonio.

The motion for rehearing is overruled.

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(*Supreme Court of Wisconsin, Feb. 18, 1902.*)

[89 N. W. Rep. 125.]

Special Verdicts—Instructing Jury as to Effect of Contributory Negligence.

Where a case is submitted to the jury on a special verdict, it is error to tell them the legal effect of their answer on the question of contributory negligence.

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Street Railways Obstructing Street in Removing Snow from Track—Pleading.

A complaint against a street railway company, setting forth the requirements of an ordinance that it shall not allow snow or ice to accumulate on its tracks in a quantity to obstruct or hinder the passage of teams, or deposit the same on any portion of any street so as to obstruct it or render it unsafe, or so as to interfere with ordinary travel, also charges a breach of the common-law duty not to render the street unsafe for travel, by alleging that the company negligently caused the snow and ice on its tracks to be excavated and removed so as to leave a deep ditch, rendering the street unsafe and dangerous for public travel.

Same—Same.*

A street railway, by accepting its franchise to operate over public streets, assumes the duty of not leaving declivities on the sides of its track, dangerous to travel, in clearing the snow from its track.

Driving across Street Railway Track Obstructed by Snow—Contributory Negligence.

For one to attempt to drive across a street railway track where there is a slope of 11 to 14 inches in the snow in a distance of from $1\frac{1}{2}$ to 3 feet is not negligence per se.

Appeal from circuit court, La Crosse county; J. J. Fruit, Judge.

Action by Mary Gerrard against the La Crosse City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action to recover for personal injuries. The facts were substantially as follows: The defendant is a street railway company operating its tracks in the city of La Crosse. One section of the ordinance giving the company the right to operate its railroad provided that the railway company should not allow snow or ice to accumulate on its tracks in a quantity sufficient to obstruct or hinder the passage of carriages or sleighs, and should not deposit the same on any portion of any street, so as to obstruct or render the same unsafe, or interfere with ordinary travel thereon. Market street, in the city of La Crosse, runs east and west, and is 66 feet in width, and the defendant operates a single track upon the said street; the track being located in the center of the street. The width of the roadway between the curbs is 38 feet; the width of the railway track is 5 feet; thus leaving a distance on each side of the track of $16\frac{1}{2}$ feet. Upon the night of December 11 and 12, 1899, there was a severe snow storm, 14 to 16 inches deep. On the morning of the 12th the tenants on the north side of Market street at the place of the accident hereafter named, shoveled the snow from their sidewalks and curb onto the roadway, and spread it out between the curb and the track. The defendant used an electric sweeper to clear its tracks, but in order to operate the same it is necessary to clean the rails, in order to secure contact of the wheel with the rail. For this purpose early in the morning of the 12th two men were sent over the track on Market street

*See 23 Am. & Eng. Enc. Law (2d Ed.) 1032 et seq.; 7 Rap. & Mack's Dig. 456 et seq.

to shovel the snow from each rail, which they did; making a groove in the snow the width of a shovel over each rail, and throwing the snow on either side. In the afternoon of the same day the electric sweeper was put on, and swept all of the snow from the track, and a strip of 16 inches wide on the north side thereof, and threw it all on the south side of the track; leaving the track in a sort of a trench, with sloping sides of snow. Between this time and the 19th of December the street was used in the usual way by teams, and the surface was worn and packed down hard; the temperature during that time being such that there was little, if any, melting. On December 19th, on the north side of the track at the place of the accident, there began a rise or slope to the north 11 to 14 inches in height in a distance of somewhere from 1½ to 3 feet, from which place to the curb the surface was nearly level. About noon of the 19th, the plaintiff, who was a woman 50 years of age, and accustomed to handling horses, was riding in a cutter drawn by a gentle horse, went on the north side of Market street, and stopped and hitched a horse for a few moments, and went into a store. Coming out of the store, she got into the cutter and started on west, and, after proceeding a short distance, found a delivery wagon standing so that she could go no farther west upon the north side of the track. She then turned and drove across the railroad track in order to get by the delivery wagon, and while so doing the sleigh tipped over as it went down the slope on the north side of the track, and she was thrown out and injured. The jury returned the following special verdict: “(1) Did the defendant company, at or about the time alleged in plaintiff’s complaint, allow snow or ice to accumulate upon and between the rails of its track at the point where it is alleged the injury in question occurred, in a quantity sufficient to obstruct or hinder the passage of vehicles or sleighs? No (by the court). (2) Did the defendant railway company, in the removal of the snow or ice from its railway tracks, on or about the 12th or 13th day of December, 1899, at the point on Market street where the alleged injury to plaintiff occurred, deposit such snow or ice, or any sufficient quantity thereof, upon the north side of the north rail of said track, so as to unreasonably obstruct or render travel by vehicles unsafe at the point in question? No. (3) If you answer question No. 2 ‘Yes,’ then was the removal or deposit of such snow or ice by the railway company the proximate cause of the plaintiff’s injury? Not answered. (4) Did the defendant railway company, by the removal of the snow or ice from its track on or about the 12th or 13th of December, 1899, leave a deep ditch or gully where such snow or ice had been so removed, with high and steep sides, in or near the center of said street, so as to render travel upon such street at the point where the alleged injury to plaintiff occurred unsafe or dangerous for public travel? Yes. (5) If you answer question No. 4 ‘Yes,’ then was the leaving of

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such ditch or gully, with high and steep sides, by the defendant railway company, the proximate cause of the plaintiff's injury? Yes. (6) Was the plaintiff, at the time and place when the alleged injury occurred, in the exercise of ordinary care and prudence in attempting to cross the railway track at the point in question? Yes. (7) If you answer question No. 6 'No,' then was such failure to exercise ordinary care and prudence the proximate cause of the plaintiff's injury? Not answered. (8) If it shall finally be determined that the plaintiff is entitled to recover, at what sum do you assess her damages? \$7,000." Judgment was rendered upon this verdict in favor of the plaintiff, and the defendant appeals.

Woodward & Lees, for appellant.

McConnell & Schweizer, for respondent.

WINSLOW, J. (after stating the facts). The case was submitted to the jury upon a special verdict, and the court gave the jury, against proper exceptions, instructions which plainly told them the legal effect of their answer upon the question of contributory negligence. For this reason there must be a reversal of the judgment, irrespective of any other question. *Musbach v. Chair Co.*, 108 Wis. 57, 84 N. W. 36. Although there must be a new trial for the reason given, we deem it proper to consider the two main questions presented by the record, as they will doubtless arise again upon the second trial: These questions are (1) whether there was any testimony tending to show negligence on the part of the defendant; and (2) whether the plaintiff appears to have been guilty of contributory negligence, as a matter of law.

1. The city ordinance granting to the defendant company its street franchises provides, as stated in the statement of facts, that the company shall not allow snow or ice to accumulate upon its tracks in such quantities as to obstruct travel, nor deposit snow upon the street in such manner as to obstruct travel or render the same unsafe. The defendant claims that the complaint in this action charges negligence only in the violation of the ordinance, and that the jury, in answer to questions 1, 2, and 4 of the special verdict, having found that there was no accumulation or deposit of snow in violation of the ordinance, but only a removal of snow, against which the ordinance does not in terms provide, there is really no negligence proven in the case. While the complaint sets forth the ordinance requirements in detail, and charges their violation, we think it also charges something more. By the last clause of the third subdivision of the complaint it is charged, in substance, that the defendant negligently caused the snow and ice on its track to be excavated and removed in such manner as to leave a deep ditch, rendering the street unsafe and dangerous for public travel. We can construe this as meaning nothing more or less than a breach of the common-law duty not to render the street unsafe for travel, which is manifestly wholly independent of the provisions of the ordinance. It is

argued, however, that there is no such common-law duty, but that the defendant's obligations to the public are measured by the requirements of the ordinance. With this contention we cannot agree. Even in the absence of any requirements in the ordinance upon the subject, it must be held that when the defendant company received its franchise to operate a street railway upon the streets for its private gain, as well as the public convenience, it at the same time assumed a duty to the public not to unnecessarily render ordinary travel on the street dangerous. It must exercise its rights with due deference to the rights of the general public. It has no license to build and operate its tracks with total disregard of the rights and safety of the man with the horse and wagon, or the woman with the horse and cutter. On this subject the Messrs. Elliott, in their work on Roads and Streets (2d Ed., § 764), say very aptly: "A street railway company which accepts a grant or a license impliedly agrees that it will use due care not to unnecessarily impede travel or to make the use of the street hazardous. The burden which it assumes in conjunction with the benefit which it obtains is a continuing one, and it must bear it, though to do what due care and diligence requires may sometimes entail considerable expense. * * *

Where the track is cleared for its own convenience, it must do what is reasonably necessary to make the part of the street not occupied by its tracks reasonably safe, for it cannot for its own accommodation obstruct it so as to endanger travelers."

We accept these propositions as correctly stating the law. It is said that to require the company to remove any part of the snow from the street outside of its tracks is an undue burden, involving, perhaps, great labor and expense; but, as pointed out above, the company, by accepting its franchise, assumed a duty to the public, and any disposition which it is obliged to make of falling snow in order to run its cars must be such a disposition as preserves the rights of the public to have a reasonably safe street for ordinary travel. If the public right can be preserved by simply brushing the snow to one side, well and good; but if the snow is so deep that the right can only be preserved by removing the snow from its tracks and from such additional space outside thereof as is necessary to prevent the formation of a dangerous declivity, then the company must make such removal. Any disposition which it makes of the snow must be made with due deference to the rights of travel upon the highway. *Wallace v. Railway Co.*, 58 Mich. 231, 24 N. W. 870; *Smith v. Railway Co.*, 69 N. H. 504, 44 Atl. 133. The evidence in this case was entirely sufficient to call for the submission of the question to the jury whether the company, in the removal of the snow from its track, left a declivity on the north side of its track which rendered the street unsafe for public travel.

2. The question of contributory negligence was also one for

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the jury. It is said in the appellant's brief that it is not contended that plaintiff was guilty of contributory negligence from the mere fact that she attempted to cross the track where she did, but that the danger being in plain sight, and her attention not being diverted, she was negligent in attempting to drive across at a sharp angle, where it would have been perfectly safe to drive straight across. So the claim is that she was negligent only in not driving across at the proper angle. On this subject the plaintiff testified that she turned to go over the track, and drove slow over the track, and tipped over; that she drove just as straight as she could,—pretty near straight across the track. And, at request of defendant's counsel, she drew a line upon paper, or upon some diagram present at the trial, showing the way she went across the track; but this paper has not been preserved in the bill of exceptions, and hence we have not the benefit of it. The testimony tends to show that the plaintiff exercised some degree, at least, of additional care, in attempting to cross the track. It has been held in numerous cases in this and other courts that a traveler driving upon a highway is not necessarily guilty of contributory negligence because he attempts to pass over or around a defective place of which he has knowledge. The defect may be so serious or dangerous that a court would be justified in saying that any attempt to proceed would be negligence, but in all other cases the question is whether a reasonably prudent man, exercising ordinary care, would attempt to proceed under the circumstances, and, if so, whether the plaintiff used that additional care which such a man would exercise in view of his knowledge of the danger. *Kelley v. Town of Fond du Lac*, 31 Wis. 179; *Kenworthy v. Town of Ironton*, 41 Wis. 647; *Mahoney v. Railroad Co.*, 104 Mass. 73; *Thomas v. Telegraph Co.*, 100 Mass. 156. It must appear, in order to justify a finding of due care in such a case, that the traveler exercised such care as persons of common and reasonable prudence would ordinarily exercise under such circumstances; that is, a degree of care proportionate to the increased danger. If the danger is such as to require unusual precautions, the traveler must use such precaution. *Elliott, Roads & S.* (2d Ed.) § 635. Tested by this rule, we must say that the apparent danger was not so great as to justify the court in saying that the plaintiff was guilty of contributory negligence, as matter of law, in attempting to cross the track, but that the question whether the plaintiff exercised ordinary care in making the attempt in the manner in which she did make it was a question for the jury, under proper instructions. There is a very plain line of distinction between a case like the present and the case of foot passengers who are injured by reason of seen and known defects in or upon a sidewalk. In the latter class of cases, of which *Hausmann v. City of Madison*, 85 Wis. 187, 55 N. W. 167, 21 L. R. A. 263, 39 Am. St.

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Rep. 834, and Devine *v.* City of Fond du Lac (present term) 88 N. W. 913, may be considered typical, it has been held that a traveler upon a sidewalk, who sees a defect before him, such as a piece of ice or a slippery or uneven stone, and walks upon it without necessity, and taking no precautions for his safety, is guilty of contributory negligence. The foot passenger has absolute control over his movements, may stop and turn aside at will and without danger, and hence may properly be held to a strict rule of accountability under such circumstances. But the traveler with a horse and wagon or sleigh is in an entirely different situation. His movements may not, indeed cannot, be absolutely free. His equipage cannot be turned in a moment away from danger. His view is not only not so clear, but his attention may be necessarily occupied with the handling of his horse, and many circumstances may be present which will be entitled to be considered in judging of the degree of care which he exercises, which cannot be present in the case of the foot passenger upon a sidewalk. We have drawn attention to the line of cases last mentioned simply for the purpose of pointing out the distinction between them and the present case, without intimating, however, that there may not be cases of foot passengers who will be justified in attempting to pass over a known defect in a sidewalk, if it is shown that they took some precautions fairly commensurate with the increased risk. Richards *v.* City of Oshkosh, 81 Wis. 226, 51 N. W. 256; Salzer *v.* City of Milwaukee, 97 Wis. 471, 73 N. W. 20.

We think the questions submitted by the court to the jury fairly cover the issues in the case, and we have found no prejudicial errors in the record, save the error first referred to in this opinion, and for this there must be a reversal. Judgment reversed, and action remanded for a new trial.

STATE *ex rel.* SORREL *v.* FOSTER, Judge.

(Supreme Court of Louisiana, Dec. 16, 1901.)

[31 So. Rep. 57.]

Supreme Court—Jurisdiction over Inferior Courts.

Article 90 of the constitution of 1879, and article 94 of the constitution of 1898, give this court plenary powers of control and general supervision over inferior courts.

Same—Same.

And in the exercise of this power the court will issue its writs in its discretion, according to the exceptional features of each case submitted.

Same—Same—Mandamus.

The writ of mandamus will lie to compel a judge to try a case, when he declines to try it on an erroneous determination of a question of practice preliminary to the whole case.

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Stock Killed on Track—Necessity of Proving Negligence—Statute.*

Act No. 70 of 1886 relieves the owner of stock killed from proving negligence or fault on part of the railway company, in an action to recover the value of the stock.

Same—Necessity of Pleading Negligence.

Accordingly, a sufficient cause of action is set forth by the owner when he avers his animal has been killed, when and where killed, and that its value is so much.

Pleading.

As a plaintiff may not prove what he does not allege, so he need not allege that which he does not have to prove to make out his case. (Syllabus by the Court.)

Application by the state, on the relation of A. Sorrel, for writs of mandamus and certiorari to T. Don Foster, Judge. Writ of mandamus issued.

Cammack & Muller, for relator.

Percy Saint, for respondent.

BLANCHARD, J. The relator instituted suit in the Second justice of the peace court, parish of Iberia, against Morgan's Louisiana & Texas Railroad & Steamship Company, to recover the sum of \$90, the value of a bull killed by the company's train of cars. The company failed to plead or appear in the magistrate's court, and judgment in due course was entered up in favor of the relator for the amount claimed. Whereupon, the company took a suspensive appeal to the district court of that parish, of which the respondent herein is the presiding judge. In the appellate court the defendant company filed an exception of no cause of action.

Relator urges that the respondent judge has dismissed his case on an erroneous determination of a question of practice preliminary to a trial upon its merits. The question, then, presented is: Did the judge err in sustaining the exception of no cause of action because the relator had failed to allege in his petition the killing of his bull was the result of the fault of the railway company? The answer to this depends upon the effect to be given to Act No. 70 of 1886. That act reads: "That in suits against railroad companies for the loss of stock killed or injured by them, it shall be sufficient in order for the plaintiff and owner to recover to prove the killing or injury, unless it be shown by the defendant company that the killing or injury was not the result of fault or carelessness on their part, or the negligent or indifferent running or management of their locomotive or train." It will be observed this statute changes in an important respect the rule which obtained prior to its enactment. Then, the claimant owner must prove the killing or injury and the fault of the company. Now, it

*As to the statutory presumption of negligence where stock is killed on a railroad track, see note, 11 Am. & Eng. R. Cas., N. S., 849 et seq.

As to whether the killing of stock on track creates a presumption of negligence, see *Southern Ry. Co. v. Reaves* (Ala.), 20 Am. & Eng. R. Cas., N. S., 784, and foot-note.

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entirely suffices for the owner to recover that he prove merely the killing or injury. Since the law relieves the owner of proving negligence, wherefore the necessity of alleging that which he does not have to prove? His cause of action is complete, under the law as it now stands, when he sets forth his animal has been killed by the defendant company, where and when killed, and that its value is so much. He does not have to prove anything save this to recover. Therefore he has a cause of action when he alleges this. The public policy of the state announced in Act No. 70 of 1886 is that railway companies must pay for all stock killed or injured by their trains unless they (the companies) succeed in showing the killing or injury occurred through no fault of theirs. It is therefore for the railway company, in its answer to a suit, to allege no negligence, and to prove no negligence. It is not for the plaintiff to either allege fault or prove fault on part of the company. It would be requiring a vain thing of the plaintiff to insist he must allege negligence when he does not have to prove it. It is surplusage to aver that which need not be proven to make out a case. 2 Rice, Ev. p. 1101. As a plaintiff may not prove what he does not allege, so he need not allege that which the law relieves him from proving. The district judge should have overruled the exception of no cause of action filed in his court, based on the absence of the averment of negligence in the relator's petition.

It is therefore ordered that a peremptory writ of mandamus do issue, commanding the respondent judge to reinstate the cause of A. Sorrel against Morgan's Louisiana & Texas Railroad & Steamship Company on his docket, and to proceed to the trial thereof on its merits.

 GEORGIA & A. RY. CO. v. COOK.

(*Supreme Court of Georgia, Feb. 7, 1902.*)

[40 S. E. Rep. 718.]

Railroads—Injury to Stock.*

When, in the trial of an action for the destruction of property, alleged to have been caused by a locomotive upon a public crossing, it affirmatively appears that the collision from which the injury resulted was in no way attributable to a failure of the defendant's servants to blow the whistle or check the speed of the locomotive, the law with respect to observing such precautions in approaching such a crossing is not applicable. Thus, where a mare suddenly and frantically ran towards and rushed against a locomotive while it was passing over a public crossing, and was thus killed, the servants of the railway company having done nothing to cause the animal to act in this manner, the company was not liable to the owner merely because its servants did not observe the requirements of the "blowing and checking law."

(Syllabus by the Court.)

*See note, 11 Am. & Eng. R. Cas., N. S., 857; 8 Am. & Eng. Enc. Law (2d Ed.) 415 et seq.; 1 Rap. & Mack's Dig. 118 et seq.

Error from superior court, Telfair county; D. M. Roberts, Judge.

Action by Morgan Cook against the Georgia & Alabama Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Eason & McRae, for plaintiff in error.

E. D. Graham, for defendant in error.

LUMPKIN, P. J. The Georgia & Alabama Railway assigns error upon the overruling of a motion for a new trial, by which it sought to set aside a verdict rendered against it in favor of Morgan Cook for the killing of a mare. The plaintiff below proved at the trial that the animal had been killed by a collision with a locomotive of the defendant, but introduced no evidence showing the particulars of the catastrophe. He therefore relied exclusively upon the presumption of negligence which the law raised against the company. The defendant showed, by the positive and uncontradicted testimony of its engineer and fireman, that the plaintiff's mare was not run over or struck by the locomotive, but that she suddenly and in a frantic manner rushed against the locomotive while it was in motion,—the company's servants having done nothing to cause her to act thus,—and was killed by the concussion. It was not, therefore, the case of a locomotive running over an animal, but of an animal attempting to run over a locomotive. The circumstantial evidence in behalf of the plaintiff tended to show that the collision occurred upon a public road crossing. The direct and positive evidence for the defendant demonstrated that the mare rushed against the locomotive just after it had passed over the crossing, or was about to leave the same. There was also testimony that the defendant's servants had failed to observe the statutory requirements as to blowing the whistle of the locomotive and checking the speed of the train in approaching public road crossings. The court, by its charge, applied to the case these provisions of the law. In so doing, his honor read to the jury the following extract from the opinion delivered by Chief Justice Simmons in the case of *Railway Co. v. Hall*, 109 Ga. 370, 34 S. E. 606: "Where the servants of the railroad company fail to observe it [the law as to blowing and checking], and any person or property is injured upon the crossing, the company can make no defense except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it in the way of mitigation of damages." The language thus used must, of course, be interpreted with reference to the facts of the case with which the Chief Justice was dealing. In that case it appeared that the failure of the company to observe the statutory requirements as to blowing and checking contributed directly to the injury of which complaint was made. This failure was consequently, relatively to the plaintiff, an act of negligence.

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In the case before us the failure of the company to comply with the "blowing and checking law" was not the cause of the injury, and therefore the statute was not applicable. The mare was not killed upon the track of the railway; and, even if she was, when she struck the locomotive, in the road, just where it was about to come in contact with the rails, it could not be fairly said, within the meaning of the law, that the collision took place on the crossing. Undoubtedly such a failure as that referred to above is, in the abstract, a negligent act; but negligence relative to one to whom no duty is due with respect to the matter in question does not give to him a right of action. In this connection, see *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990. As the witnesses for the company were unimpeached and their testimony uncontradicted, the case should have been determined upon the assumption that their version of the matter was true. This being so, the charge complained of was inappropriate, and the verdict rendered was contrary to law. See *Railroad Co. v. Strickland*, 114 Ga. 133, 39 S. E. 943.

Judgment reversed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO. v. HARDIN.

(*Supreme Court of Georgia, Feb. 4, 1902.*)

[40 S. E. Rep. 738.]

Appeals—Review—Second Appeal.

At the March term, 1901, a new trial was ordered in this case because it appeared that the trial judge did not exercise the discretion imposed upon him by law in passing upon the sufficiency of the evidence to support the verdict. 38 S. E. 949, 113 Ga. 453. At the trial now under review a similar verdict was returned, and the judge, in the exercise of such discretion, upheld it. This being so, and there being some evidence to sustain the jury's finding, the supreme court will not again interfere, though apparently a verdict for the defendant would have been more consistent with the evidence as a whole.

Instructions.

There was no error in refusing to give the charge requested.

Killing Stock—Evidence—Condition of Engine—Negligence—Absence of Headlight.*

Evidence of the equipment of a locomotive, its condition, and the character of the headlight it carried, is admissible in evidence on the trial of a case brought to recover damages for killing a mule at night by the operation of such locomotive, as bearing on the question of negligence; and this is true notwithstanding the operation of a locomotive without an electric headlight is not of itself an act of negligence. The failure of the trial judge to charge as complained of was not, in the absence of a request to do so, cause for reversal.

Trial—Arguments of Counsel.

The trial judge did not err in refusing to permit defendant's counsel to read to the jury in his argument an opinion rendered by this court. Under the obligation which the law imposes on jurors, they should, under proper instructions, return a verdict on the evidence as they understood it, uninfluenced by the opinion of any other tribunal.

(Syllabus by the Court.)

*See generally, 1 Rap. & Mack's Dig. 97 et seq.

St. Louis, etc., Ry. Co. v. Cline

Error from city court of Forsyth; W. M. Clark, Judge.

Action by J. H. Hardin against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Hall & Boynton and R. L. Berner, for plaintiff in error.

J. B. Williamson, for defendant in error.

PER CURIAM. Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. CLINE.

(*Supreme Court of Arkansas, Nov. 9, 1901.*)

[65 S. W. Rep. 427.]

Railroads—Animals—Injury—Evidence—Verdict.*

Where in an action for damages for killing a horse, the evidence is undisputed that the horse came on the railroad track so suddenly that the injury could not be avoided, and that all reasonable efforts to avoid it were made, the prima facie case made under the statute by proof of the killing of the horse by the train is overturned, and a verdict for plaintiff is not justified.

Appeal from circuit court, Hot Spring county; Alexander M. Duffie, Judge.

Action by one Cline against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dodge & Johnson, for appellant.

PER CURIAM. This is an appeal from a judgment of the circuit court of Hot Spring county in favor of plaintiff and against the defendant company for \$40, as damages for killing a horse belonging to plaintiff. The circuit judge gave to the jury a clear and accurate instruction covering the law of the case, and the only point raised here is that the evidence was not sufficient to support the verdict. We have read the evidence carefully as it appears in the transcript, and are of the opinion that the contention of appellant must be sustained, for the evidence of plaintiff's own witnesses makes it very clear that the horse came upon the track so suddenly that no effort on the part of the employees in charge of the train could have avoided the injury. The engineer and fireman in charge of the train testified that they were keeping a lookout, and used all reasonable efforts to avoid the injury, but were unable to do so. Their statements are corroborated by the testimony of the witnesses for plaintiff who saw the accident. We are therefore of the opinion that the prima facie case made under the statute by proof of the killing of the horse by the train has been overturned, and that the evidence does not sustain the verdict.

Judgment reversed, and new trial granted.

*See preceding case, and foot-note.

KLING *v.* CHICAGO, M. & ST. P. RY. CO.*(Supreme Court of Iowa, Dec. 19, 1901.)*

[88 N. W. Rep. 355.]

Killing Stock—Sufficiency of Railroad Gate at Private Crossing—Question for Jury.*

A railway constructed in its fence at a private crossing on plaintiff's farm an ordinary slide gate on ground sloping to the west, at which end the gate was hung. Subsequently the projecting ends of the boards on the east end of the gate were partly destroyed by fire. There was no fastening on the gate, and witnesses testified that a slight move, or a little shake, would open the gate. Animals belonging to plaintiff were killed by a train during the night, and the gate, which a witness testified was closed on the previous evening, was found swung open a few feet, and had hair on it, indicating that the animals had passed through: *held*, that it was for the jury to determine whether the gate was sufficient, and, if not, whether its insufficiency was the cause of the animals being killed.

Trial—Discretion of Court as to Admitting Testimony.

Where plaintiff closed his testimony before adjournment on the first day, but in the morning was permitted, over objection, to examine another witness, and the defendant closed just prior to the noon adjournment, after which the court refused to allow him to examine another witness for the purpose of impeaching plaintiff's last witness, such refusal was not such plain abuse of discretion as to cause a reversal.

Instructions—Warranted by Evidence.

An instruction that the jury should inquire whether or not the circumstances in evidence "fairly and naturally led to the conclusion" that plaintiff's stock opened the gate, and thus entered on defendant's right of way, was correct, and it was not necessary that the evidence must exclude every other reasonable hypothesis.

Appeal from district court, Wapello county; Robt. Sloan, Judge.

Action to recover double damages, under the statute, for the killing of two colts and one jenny, by one of defendant's trains. Verdict and judgment were rendered for plaintiff, and defendant appeals. Affirmed.

Jaques & Jaques and J. C. Cook, for appellant.
Steck & Smith, for appellee.

GIVEN, C. J. 1. There is no question but that the animals were killed by defendant's train at a place where defendant had a right to fence; that said animals escaped from an adjoining pasture, where they were kept, through a gate placed by defendant in its right of way fence, at a private crossing on the farm occupied by plaintiff, or that the proper notice and affidavits were served. "The contention of the defendant is that there is no evidence tending to show that the gate was insufficient, or, even if the jury were authorized to find that it was insufficient, that there is no evidence tend-

*As to the duty of railroad companies to make gates, bars, and crossings for landowners, see *Mobile & O. R. Co. v. Tiernan*, 15 Am. & Eng. R. Cas., N. S., 564, and note, 567 et seq.

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ing to show that such insufficiency in any wise caused or contributed to the destruction of the stock." At the place under notice the defendant's track and fence were east and west, and the gate in question was in the south fence, at a point where the ground slopes to the west and south. The gate, as originally constructed, was an ordinary sliding gate, made of 4 fence boards, 16 feet long, bound together at proper intervals by a cross strip at each end and one in the middle. It was hung to slide to the west, on a slight incline, between two posts, on a cleat nailed to these posts, under the top board of the gate. The cross strip at the west end was nailed to the boards at the end thereof, the strip across the east end was set back from the ends of the boards, so as to leave a projection beyond the strip to be passed between the two posts at that end, and to rest upon a cleat on the posts, under the second board from the top. Owing to the slope of the ground to the west, the east end of the gate, when closed, rested upon the ground, while the west end was several inches above the surface, and rested on the cleat under the top board. The gate as originally constructed was provided with a hook and staple at the east end for fastening it, and there is no question but that, as originally constructed, it was in all respects a sufficient gate. Prior to the killing of the animals the gate had been impaired by fire that burned off the east end of the three upper boards, so that the one next the bottom board only projected 22 inches, the next above 10 inches, and the top board 13½ inches beyond the cross strip, as shown by the gate exhibited on the trial. It then showed that the lower board projected 26 inches, and had not been burned. There was evidence tending to show that the lower board on the gate, at the time of the fire, had also been burned, and that this lower board had been placed upon the gate since the killing of the animals. The east end of the board next to the top one, being the one that rested on the cleat, was burned off so as to round the end from the under to the upper edge in the shape of a sled runner, as a witness aptly described it, the curve extending back on the lower edge of the board as far as the cross piece. In refitting the gate after the fire these ends were left as we have described them, and the gate was not provided with a hook and staple or other like fastening. The animals were killed in the night, and next morning the gate was found pushed back three to four feet to the west, and swung south into the pasture one to two feet, and there was hair on the east end of the gate, indicating that the animals had passed through the opening. One witness testifies that the gate was standing closed the evening before. Defendant's section foreman, Mr. Donahue, testified: "I experimented to see what the gate would do when shoved back so as to loosen the east end. When it came far enough to let the two top boards out of the post, it leaned over into the pasture, the east end of the lower board rested on the ground, and the west

was about 5½ inches above the ground. I think the fall of the ground from east to west across the gate is 10 to 12 inches." From this it will be seen that the gate was hung with an incline to the west of 5 or 6 inches. The plaintiff testified: "It would take but a slight move to open the gate when it was closed. The gate goes right down the hill. Just a little shake will open the gate when it is not hooked. I saw it tried or tested— By shaking that gate it would move back; just by shaking it after it got on the ground. There was fall enough to shake that gate down the grade after it was on the ground. Just shake it backwards and forwards." We think it was for the jury to determine whether this gate, as it was at the time the animals were killed, was a sufficient gate for that place, and, if not, whether its insufficiency was the cause of the animals being killed, and that, upon these questions, the jury was warranted in finding as it did. Appellant cites *Bothwell v. Railroad Co.*, 59 Iowa, 192, 13 N. W. 78, as supporting its contentions. We agree with the conclusion in that opinion that "verdicts must have evidence to support them, and must not be founded upon mere theory or supposition," but we think in this case there is evidence to support the verdict. In that case the gate was found to be sufficient in its construction and fastenings, and to be the kind of gate "ordinarily used and considered good." There was no claim that the gate was liable to be opened by the wind or by animals rubbing against it. It does not appear that that gate was hung upon sloping ground, nor at an incline, or that it had been impaired by fire. The minority say: "Evidence was introduced tending to show that the gate does not rest on the ground, but slides on a rest between two posts, that it could be opened without raising it up, and that the strength of a good silk thread would open it,"—and conclude that the jury was authorized to find that it was opened by the animals. The facts are so dissimilar as that the *Bothwell Case* is not controlling. *Asbach v. Railway Co.*, 74 Iowa, 248, 37 N. W. 182, is also cited, wherein it is said: "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, simply, with that theory, for that may be true and yet they may have no tendency to prove the theory." Applying this rule to the evidence in this case, we think the only conclusion that can fairly or reasonably be drawn therefrom is that, owing to the impaired condition of the gate, the incline at which it was hung, and the absence of a hook and staple, or like fastening, it was an insufficient gate, and was opened by the animals rubbing against it. The same may be said of *Wheelan v. Railway Co.*, 85 Iowa, 167, 52 N. W. 119. *Koenigs v. Railway Co.*, 98 Iowa, 569, 65 N. W. 314, 67 N. W. 399, also cited, is unlike

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this case, in that the jury found that the night before the gate was "properly closed and fastened," while in this case the jury was authorized to find that, owing to the incline, the condition of the gate caused by fire, and the absence of a hook and staple, this gate was not properly fastened. In that case the gate was found wide open,—wide enough, as one witness says, to let a load of hay go through, a condition that could hardly have been brought about by the animals rubbing or pushing against the gate. In *Mears v. Railway Co.*, 103 Iowa, 204, 72 N. W. 510, "there is no evidence that the gate was defectively constructed, was out of repairs, or that any other fastening than placing the ends of the boards between the posts was required or used on such gates." In this case there is evidence that the gate was out of repair, and that, owing to its incline, other fastening than placing the ends of the boards between the posts was required. It is said in that case, "There is no evidence of want of ordinary care on the part of the defendant;" but that cannot be said on this. We conclude that the jury was authorized to find that the gate was insufficient, and that such insufficiency caused the destruction of the animals.

Our conclusion, upon the whole record, is that the judgment of the district court should be affirmed.

JOHNSON v. CHICAGO, ST. P., M. & O. RY. CO.

(*Supreme Court of Iowa, Jan. 22, 1902.*)

[88 N. W. Rep. 811.]

Forcing Trespasser from Moving Car.

Plaintiff, without a ticket, boarded defendant's freight train, clinging to a ladder on the side of the car. At the next station a brakeman discovered him, and put him off. As the train started he again mounted a ladder, but, on the approach of the brakeman, jumped on the ground. Before the train had entirely passed he again caught a ladder, and climbed up the side of a car. A brakeman went to him, demanded money, and ordered him off, and then stepped on plaintiff's fingers. He then retreated down the ladder, but, as the train was going 10 or 15 miles an hour, was afraid to jump. The brakeman followed, kicked plaintiff on the head or neck, and forced him to lose his hold and fall to the ground. One of his feet was caught and crushed under the wheels: *held*, that the direction of a verdict for the defendant was error; the brakeman's act being the eviction of a trespasser, and not the prevention of a trespass.

Same—Pleading.*

Where a brakeman on a railroad train expels a trespasser at such a time or in such a manner as to unreasonably imperil his life and limb, though the act is willful, it may, in an action against the company, properly be alleged as negligent.

Same.

Where plaintiff was injured by being forcibly ejected from a rapidly moving train, the fact that he was a trespasser on such train, does not constitute contributory negligence which deprives him of remedy.

*See note, 22 Am. & Eng. R. Cas., N. S., 169 et seq.

Johnson v. Chicago, etc., Ry. Co

Same—Defenses.

Where plaintiff was injured by being forcibly ejected from a rapidly moving train, the fact that he had boarded the train while it was moving, in violation of the statute making such act a misdemeanor, does not afford a defense to his claim of damages for such injury.

Appeal from district court, Woodbury county; Wm. Hutchinson, Judge.

Action for damages for personal injuries alleged to have been sustained by plaintiff in being wrongfully ejected or thrown from a moving train. At the close of the plaintiff's evidence the court sustained defendant's motion for a directed verdict in its favor. Verdict and judgment accordingly, and plaintiff appeals. Reversed.

Hallam & Stevenson, for appellant.

Wright, Call & Hubbard, for appellee.

WEAVER, J. The evidence upon part of plaintiff tended to show the following facts: On the 26th day of October, 1898, plaintiff boarded one of defendant's freight trains at Dakota City, Neb., bound for Sioux City, Iowa. He was not provided with a ticket, and rode from Dakota City to South Sioux City clinging to the ladder upon the side of one of the cars. Arriving at South Sioux City, a brakeman discovered him, and ordered him off. This order plaintiff obeyed, but when the train was pulling out he again mounted one of the ladders, but upon approach of the brakeman he jumped to the ground in safety. Before the train had entirely passed he once more caught a ladder, and climbed up the side of a car, and was once more approached by a brakeman, who demanded money and ordered him off the train. As he still clung to the side of the train, the brakeman came to the top of the ladder and stepped upon plaintiff's fingers. Plaintiff, thus attacked, retreated down the ladder, but, by reason of the speed of the train, was afraid to jump. Thereupon the brakeman, following him, kicked him upon the head or neck, forcing him to lose his hold and fall to the ground. In falling, his foot caught and was crushed under the car wheels, necessitating amputation of the limb at the ankle. The speed of the train at this time was from 10 to 15 miles per hour. Assuming that the jury may properly have found the truth of this recitation of circumstances in the case, was the trial court justified in directing a verdict for defendant? In our judgment, this question must be answered in the negative.

1. It will readily be conceded that plaintiff was an impudent and exasperating trespasser, but the law is settled beyond successful controversy that a trespass upon property gives the injured party no right to take the life of the trespasser, or to inflict upon him great bodily injury. Cases similar in all essential respects with that at bar have often been before the courts, and the principle we have mentioned has been recognized and affirmed with almost unbroken unanimity. Of the large number of authorities to this effect, we mention but a

few: *Ramm v. Railway Co.*, 94 Iowa, 298, 6 N. W. 751; *Marion v. Railway Co.*, 64 Iowa, 568, 21 N. W. 86; *Benton v. Railway Co.*, 55 Iowa, 496, 8 N. W. 330; *Johnson v. Railway Co.*, 58 Iowa, 348, 12 N. W. 329; *Rounds v. Railway Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Young v. Railway Co.*, 51 La. Ann. 295, 25 South. 69; *Schmid v. Humphrey*, 48 Iowa, 652, 30 Am. Rep. 414; *Jackson v. Railway Co. (La.)* 28 South. 241; *Elliott, R. R.* § 1254; *Suth. Dam.* 64. In view of the facts, which must be conceded for the purposes of the motion to direct, it would seem hardly possible for any serious contention that the authorities cited are not directly in point. The train was running at such speed as to make it obviously dangerous to jump, even with the exercise of the greatest skill and care; while for a man kicked or thrown therefrom to the ground there was scarcely a possibility of escape without serious, if not fatal, injury. This the brakeman, as an experienced railroad man, must have known. From his position of vantage on the upper part of the ladder, he had the plaintiff at his mercy, and deliberately kicked him down to practically certain death or serious injury. If the act was done willfully, then the appellee is liable under the statute (Code, § 2071); and, if done through mere want of care in the performance of duty, it was gross negligence. It is contended, however, that the petition does not charge a willful injury. It is true, the word "willful" is not employed by the pleader, and the act is spoken of as "negligent"; but the pleading does, in sufficiently apt terms, describe the kicking of plaintiff from the car as a deliberate and intentional act. Furthermore, even if the act was, in a just sense, willful, it may also be properly charged as negligent. The brakeman, in the line of his duty, could lawfully expel the plaintiff as a trespasser upon the train; but if he discharged that duty with excessive force or violence, or at such time or in such manner as to unreasonably imperil the life and limb of the trespasser, then he was negligent as charged, and his employer is liable. Of the authorities cited by the appellee, one only can fairly be said to give color to the doctrine advanced by counsel. It appears that this action was originally pending in the federal court, and there, after a ruling that plaintiff had failed to make a case, he was allowed to dismiss. See (C. C.) 94 Fed. 473. In the opinion there rendered, Shiras, J., recognizes the principle to which we have already referred, saying: "A trespasser is not necessarily placed without the pale of the law, and he may recover for injury willfully or recklessly inflicted upon him. Thus it is well established that a railway company cannot be justified in evicting a person from its train when the same is in such rapid motion as to necessarily cause risk to the life or limb of the person evicted, even though he is a trespasser. The high regard which the law places upon the life and limb of a citizen compels the company to exercise its right to evict a trespasser in such manner as not to incur the

charge of willful or reckless disregard of the safety of the person evicted." Applying the rule thus clearly stated to the facts of the case, the federal court held that plaintiff did not come within its terms, because "he voluntarily engaged in a running contest with the brakeman, in which plaintiff was unlawfully endeavoring to force himself upon defendant's train, and defendant was lawfully endeavoring to prevent the trespass." From this language we must conclude that the testimony before that court was less favorable to plaintiff than is shown in the record before this court. As it is here presented, it cannot be fairly said that the brakeman was simply "endeavoring to prevent a trespass." The trespass was accomplished. The plaintiff was already on the car before he was assaulted by the brakeman. The brakeman's act was not an act of prevention or defense against an intending trespasser, but was an act of eviction, and this comes squarely within the principle affirmed by Judge Shiras. Reference is also made to *Bolin v. Railroad Co.* (Wis.) 84 N. W. 446, 81 Am. St. Rep. 911. In this case the conductor ordered a certain trespasser to leave the train while in motion, and in making such exit the trespasser was killed. In exonerating the railroad company from liability, the court there says: "He [the conductor] did not touch the deceased, nor threaten violence to him, nor do anything reasonably indicating that he was about to physically compel deceased to cease the trespass, and to accept imminent danger of personal injury in doing so,"—a statement which renders that decision valueless as a precedent in the case before us. In another place the same authority concedes the validity of the rule which we apply in this case, saying: "The doctrine that human life cannot willfully be seriously imperiled to prevent or end a mere trespass upon property must not be invaded by the courts." However leniently men generally may be disposed to look upon physical punishment administered to a persistent trespasser, the law cannot safely countenance such action; nor can even a just indignation against the perpetrator of a petty wrong be permitted to justify an assault which seriously imperils the life or the person of the wrongdoer. This is neither "false humanity" nor "maudlin sentiment," as counsel suggest, but it is one of the indispensable principles which make up the barrier which Christian civilization has erected between law and lawlessness.

2. Appellee further urges that, plaintiff being a trespasser upon the train, he was therefore guilty of contributory negligence, and without remedy. The proposition is unsound. Being a trespasser, the company owed him no duty to provide him safe transportation, or to protect him against want of ordinary care on part of its employees; but it was still under the obligation which we have already mentioned,—not to evict him with unnecessary violence, nor to deliberately expose him to unreasonable hazard of injury. If the plea of contributory negligence were to be held good in such case, it

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would be equally effective if the brakeman, instead of kicking the plaintiff from the ladder, had made use of a loaded revolver.

3. Neither can it be said that, because plaintiff's act in boarding a moving train was in violation of the statute, such wrong upon his part affords a defense to the claim in suit. The fact that plaintiff's trespass was also a misdemeanor did not change the relations of the parties, nor absolve the defendant's trainmen from their obligation to observe the rules of law we have hereinbefore cited. *Schmid v. Humphrey*, 48 Iowa, 652, 30 Am. Rep. 414; *Dorsey v. Railroad Co. (La.)* 29 South. 177, 52 L. R. A. 92.

The judgment of the district court must be reversed, and the cause remanded for new trial. Reversed.

OLLET v. PITTSBURG, C., C. & ST. L. RY. CO.

(*Supreme Court of Pennsylvania, Jan. 6, 1902.*)

[50 Atl. Rep. 1011.]

False Imprisonment.

There is no liability as for false imprisonment where the crew of a train, which has run over a boy, crushing his foot, remove him from a house near at hand, where he had been taken, to a city hospital, though he said he did not want to go, and said that his family physician had been sent for.

Appeal from court of common pleas, Allegheny county.

Action by Thomas Ollet, by his father and next friend, Henry W. Ollet, against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the court below is as follows (Shafer, J.):

"The action is for false imprisonment. The plaintiff was a boy 17 years of age, and while endeavoring to climb upon a freight train of the defendant company fell from it. The wheel ran over his foot, crushing the front part of it. He was immediately taken to a private house, the only one in the neighborhood, and the crew of the freight train on which he was injured, having run to Carnegie, a distance of one or two miles, came back again to the house with the engine, and finding the boy in the house, and no one present except a young woman who lived there, took him on the engine to Carnegie, where the company's physician was in attendance. An uncle of the boy who lived in Carnegie was also at the station when the boy was brought there, and upon the advice of the company's doctor, and accompanied by the uncle, he was taken to the West Penn Hospital, where his foot was afterwards amputated. At the time of the accident one or more other boys were present, and one of them had gone to Carnegie to call the family physician of the boy's father, and

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another had gone to the house of the boy's father to call him, the distance to each being a mile or two, and the roads being very muddy. When the crew of the train got to the house they were told by the boy that his family physician had been sent for, and that he did not want to go to the hospital, but they insisted that he should; carried him out; put him on the tender of the engine. This removal of the boy from the house by the railroad to Carnegie, and thence to the hospital, is the false imprisonment complained of. That the crew of the train, in doing what they did, were endeavoring to act the part of the good Samaritan, is perfectly plain, and we do not see how a jury could be allowed to find otherwise from the evidence. The circumstances certainly seemed to call for great haste, and one who endeavors to assist his neighbor who is in great danger and distress is certainly not liable for a mistake in judgment, nor does there appear to have been any such mistake made in this case. In addition, we do not see how the railroad company could be held liable for a false imprisonment on these acts of its employees, which were certainly not done within the scope of their employment, which was that of a crew of a freight train. The motion to take off the nonsuit is refused."

Smith & Kearns, for appellant.

Dalzell, Scott & Gordon, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the court below refusing to take off the nonsuit.

SOUTHERN RY. CO. v. GRESHAM.

(*Supreme Court of Georgia, Nov. 9, 1901.*)

[39 S. E. Rep. 883.]

Trial—Opening and Closing Arguments.

Even if an answer to a petition admits sufficient facts to entitle the plaintiff *prima facie* to a recovery, it is not erroneous to refuse to allow the defendant to open and conclude the argument, when no request to do so is presented until after the testimony on both sides has been closed.

Instructions—Issues Not Made.

It is erroneous for a trial judge to charge the jury upon issues not made by the pleadings or evidence in the case on trial; and where this is done, when the evidence is conflicting on the issues really involved, in a way which may mislead the jury, it is cause for a new trial. (a) Where the questions raised were whether the conductor or other authorities on a railroad train had improperly arrested, misused, and maltreated the plaintiff, and no question as to the propriety or impropriety of ejecting him from the train was, under the evidence, involved, a charge which injected this issue into the case was erroneous.

Damages—Mental and Physical Suffering—Instructions.

Where, in the trial of a case, evidence has been introduced tending to show that mental and physical pain has resulted from the wrongful act, to recover damages for which the action was instituted, it is not

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error to instruct the jury that there is no fixed rule for computing damages of this nature, but that the same are left to the enlightened conscience and intelligence of impartial jurors.

Trespassers—Right of Conductor to Cause Arrest of Person Guilty of Misdemeanor in Stealing Ride.

An attempt to steal a ride by concealing one's self on a moving train of cars is a misdemeanor, and the conductor is by law authorized to cause a person guilty thereof to be arrested. Where, in a given case, the conduct of the passenger is such as to afford reasonable ground and probable cause for believing that one is violating this law, his arrest by the conductor does not render the railroad company liable, although it be shown that the person was not, as a matter of fact, violating or attempting to violate the statute. (a) The court erred in refusing to charge a request containing the above legal proposition. (b) There was in the present case sufficient evidence to find that the plaintiff was actually violating the law in this regard. Though attempt at concealment is one of the essential elements of the offense, there is in the record sufficient evidence to establish the fact that the plaintiff attempted to conceal himself on the train.

Instructions.

The refusal to give in charge the other requests specified was not error.

Appeal—Review—Jurisdiction.

The point that the trial court was without jurisdiction is (certainly as to some of the alleged causes on which the right of recovery is predicated) without merit, and, not having been raised by a proper plea or motion in the court below, will not be considered, when presented in this court, as a meritorious ground for a new trial.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by Charles Gresham, by his next friend, against the Southern Railway Company. Judgment for plaintiff.

Defendant brings error. Reversed.

Shumate & Maddox, Geo. A. H. Harris, and Mr. Chamlee, for plaintiff in error.

Fouche & Fouche and McHenry & Maddox, for defendant in error.

LITTLE, J. Gresham, by his next friend, brought suit against the railroad company for injuries he claims to have sustained by the wrongful action of certain employees of the company. The action was seemingly instituted to recover damages for a malicious arrest and malicious prosecution, and for abuse of the person of plaintiff while under arrest. There was a general denial of the allegation that plaintiff was maltreated while under arrest, and an admission of the arrest, and a justification of the same on the ground that the plaintiff was violating one of the statutes of this state in attempting to steal a ride upon the train; and that the prosecution was with probable cause and in reasonable time. Hence a material question was whether the plaintiff was stealing a ride on the train of the company or not. The trial resulted in a verdict for the plaintiff for the sum of \$2,000. The company made a motion for a new trial

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on a number of grounds. Those alleging that the verdict was contrary to the evidence, without evidence to support it, contrary to law, and excessive in amount, are not dealt with here, because, under the rulings made, the case must be again tried. The evidence is voluminous, and, for the reason above stated, it is not necessary that it should be reported. Other than the general grounds of the motion, the questions raised in the application for a new trial are dealt with in the headnotes above, and need no elaboration to establish the principles which they contain. They are sufficiently full to give direction at another trial on the points of law to which they apply, and cover a consideration of the errors assigned other than those with which it is not now necessary to deal.

Judgment reversed. All the justices concurring.

RATHBONE v. OREGON R. CO.

(*Supreme Court of Oregon, Dec. 16, 1901.*)

[66 Pac. Rep. 909.]

Liability for Injury to Person Riding on Hand Car by Invitation of Section Foreman—Negligence in Running around Curve without Signals.*

Deceased, while riding on a hand car by invitation of the section foreman, was killed by defendant's irregular train, which came around a sharp curve at a high rate of speed. There was no time to check the train after the car came in sight. The negligence charged was in running such train around the sharp curve at a dangerous rate of speed without signals or precautions to discover whether there were persons on the track. The foreman, without the knowledge and against the rules of the defendant, had been accustomed to take persons over this piece of road on the hand car: *held*, that negligence on the part of defendant was not shown.

Same—Who Are Not Passengers.†

A section foreman on a railroad is not an agent of the company for the purpose of carrying passengers on a hand car, and a person riding on such car at the invitation of such foreman is a trespasser.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Jr., Judge.

Action by Ella Rathbone, administratrix of the estate of Charles A. Rathbone, deceased, against the Oregon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. W. Cotton, for appellant.

E. B. Watson and Frank Schlegel, for respondent.

BEAN, C. J. This is an action to recover damages for the death of Charles A. Rathbone, alleged to have been caused by

*As to liability for injury to person riding on hand car by permission of employees, see 1 Rap. & Mack's Dig. 59 et seq.; 2 Id. 427 et seq.

†As to who are passengers, see *Gradert v. Chicago & N. W. Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 118, and note, 121 et seq.

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the negligence of the defendant. The facts are that on Sunday, June 13, 1897, Rathbone and his wife, at the invitation of one of defendant's section foremen, went with him and his family on a hand car from Rooster Rock to Corbett, a distance of about a mile and a half, to "get some cherries to can." Upon their return, while passing around a curve in the road, where the view is obstructed, a collision occurred between the hand car and one of defendant's trains going west, and Rathbone was killed. The evidence shows that when the train and hand car came in view of each other they were so near that neither could be stopped in time to avoid the collision, and no negligence is charged against the operators of the train on this account. The ground of negligence alleged, omitting some averments upon which there was no proof whatever, is, in substance, that the defendant's roadbed and track between the stations named had been so continuously used since their construction by people traveling on foot, bicycles, and hand cars, with the knowledge and permission of the company, that it was bound to exercise reasonable caution to avoid injuring persons so traveling thereon; that, in disregard of its duty in this respect, it carelessly and negligently ran an irregular train, composed of a locomotive with an observation and baggage car in front, around sharp curves and embankments, and against the hand car upon which the deceased was riding, at a high and dangerous rate of speed, without ringing the bell, sounding the whistle, or giving any notice of its approach, or taking any precaution whatever to discover whether there was any person on or near the track in front of such train. The testimony, however, does not show that people not connected with the railroad company had used the track at the place indicated in any way except by riding upon a hand car thereon, or that the track was used in this way by the public generally, but is to the effect that from Corbett east for some miles the defendant's roadbed is located along the Columbia river, at many places wholly occupying the space between the river and a high bluff which rises above it; that the country in the vicinity is very sparsely settled, and the means of communication between the different stations are very imperfect, except by the railway; that for some time prior to the accident, the defendant's section foremen, as an accommodation, had been accustomed to invite people living in the vicinity of the road to ride with them on hand cars, and had often used such cars to take their families and neighbors up and down the track on business and pleasure. This was not only without the authority of the company, but against its rules, and there is no testimony to show that it ever came to the attention of defendant's officers or agents; nor was the physical evidence of such use of a character that would impart knowledge thereof. The deceased was therefore riding on the hand car without permission, express or implied, from

the company, and against its rules. Under all the authorities, the only duty it owed him under such circumstances was to exercise reasonable care not to injure him after his presence on the track was discovered. Except at public crossings or on public highways, the track of a railroad company is its private property, upon which no unauthorized person has a right to be. Its free and unobstructed use is not only essential to the transaction of the company's business, but to the safety of passengers on its trains. One who uses the track or right of way for his own convenience or pleasure, without the permission or invitation of the company, occupies the position of a mere trespasser. The company is under no legal duty or obligation to take precautions or to keep a lookout for him, its only duty being to use reasonable care not to injure him after he is discovered. *Ward v. Southern Pac. Co.*, 25 Or. 433, 36 Pac. 166, 23 L. R. A. 715; *Cederson v. Navigation Co.*, 38 Or. 343, 63 Pac. 763. Nor did the fact that Rathbone was riding on the hand car at the invitation of the section foreman in any way change or enlarge the duty or obligation of the defendant toward him. The section foreman was not the agent of the company for any such purpose, and could not bind it by his acts. He was not engaged in carrying passengers, nor is a hand car used for such purpose. The deceased was not entitled to the rights of a passenger (*Railway Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982; *Hoar v. Railroad Co.*, 70 Me. 65, 35 Am. Rep. 299), but was wrongfully upon the track, notwithstanding he was there by invitation of the foreman (*Snyder v. Railroad Co.*, 60 Mo. 413; *Flower v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Duff v. Railroad Co.*, 91 Pa. 458, 36 Am. Rep. 675; *Keating v. Railroad Co.*, 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328; *Craig v. Mt. Carbon Co.* [C. C.] 45 Fed. 448; *Ream v. Railroad Co.*, 49 Ind. 93). He consequently had no right to complain of the manner in which the train was made up or the way in which it was operated. These things, so far as he was concerned, were purely within the discretion of the company. Negligence is a breach of a legal duty, and, before any action can be maintained therefor, there must exist some obligation of duty toward the plaintiff that the defendant has left undischarged or unfulfilled. The defendant owed no legal duty to the deceased, except not to wantonly or intentionally injure him because he was wrongfully upon its track or right of way, and therefore it cannot be charged with negligence upon mere proof of the manner in which it ran or managed its train.

It follows that the judgment of the court below must be reversed, and the case remanded for such further proceedings as may appear necessary, not inconsistent with this opinion.

MIZZELL v. SOUTHERN RY. CO.*(Supreme Court of Alabama, Dec. 20, 1901.)*

[31 So. Rep. 86.]

Liability for Injury to Trespasser Walking on Ends of Cross-Ties Where No Evidence of Wantonness.*

Plaintiff, having crossed a railroad, was proceeding along the side of the track on the ends of the cross-ties, when he was struck by the tender of an engine which was being run backwards: *held*, that plaintiff could not recover for the injuries sustained, there being no evidence of wantonness on the part of the trainmen, nor even that they were aware of his presence.

Same—Signals.

Plaintiff, being injured by an engine while walking along the cross-ties of the track, cannot complain that the trainmen were guilty of negligence in failing to give signals of approach, his contributory negligence being a complete defense.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by Thomas H. Mizzell against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Denson, for appellant.

Smith & Weatherly and E. D. Smith, for appellee.

McCLELLAN, C. J. It is settled in this state that persons have the right to cross a railroad track, at least when it is not fenced, wherever they have occasion to be beyond it. Of course, the duty of exercising care must be observed. But no person has a right to use the track of a railroad as a road or path, and if a person is injured by a passing engine or train while walking on the track, or on the ends of the cross-ties by the side of the track, he cannot recover damages therefor unless the trainmen willfully or wantonly ran against him, or unless they failed to exercise due care to avoid striking him after they became aware of his peril, and such failure contributed to the injury. The uncontroverted evidence in this case shows that when Mizzell, the plaintiff, was stricken by the tender of the engine which was being run backwards, he was not in the act of merely crossing defendant's track, but, having crossed over the rails, he was proceeding along the side of the track on the ends of the cross-ties. There was no evidence of willfulness or wantonness on the part of the trainmen. Nor was there any evidence tending to show that they were ever aware of plaintiff's presence, and hence there could be no ground for insistence that they were wanting in due care after coming to a knowledge of plaintiff's peril. To the charge that defendant's servants were guilty of negligence in

*As to railroad's duty to trespassers on track, see *Dyche v. Vicksburg, S. & P. R. Co.* (Miss.), 23 Am. & Eng. R. Cas., N. S., 526 and foot-note.

Louisville & N. R. Co. v. Kemery's Adm'r

failing to give signals of approach, which some of the evidence tends to support, the contributory negligence of the plaintiff in his attempted use of the track is a complete defense, and the city court properly gave the affirmative charge, with hypothesis for the defendant. The rulings on demurrer to the complaint were innocuous, whether good or bad.

Affirmed.

LOUISVILLE & N. R. CO. v. KEMERY'S ADM'R.

(*Court of Appeals of Kentucky, Jan. 15, 1902.*)

[66 S. W. Rep. 20.]

Duty to Prevent Trespasser on Train from Being Injured in Probable Collision.*

In an action against a railroad company to recover damages for the death of a trespasser on a train, resulting from a collision with another train, defendant was not prejudiced by an instruction telling the jury to find for plaintiff if defendant's servants knew before the injury of the decedent's presence on the train, and that he was in danger from a probable collision, and that after such knowledge they failed to use ordinary care to prevent injury to him, and that he was killed as the result of such failure.

Appeal—Review.

Whatever opinion the court may have as to the facts, it does not feel authorized to set aside a second verdict for plaintiff.

Harmless Error.

While a trespasser may have had no right to rely upon a rule requiring freight trains following each other to keep 10 minutes apart, the error, if any, in permitting the rule to be read, was harmless, as defendant had already brought out on the cross-examination of a witness the fact that the rule was in existence.

Same.

There can be no reversal for an error in admitting evidence which did not prejudice defendant's rights, though the evidence was manifestly incompetent.

Appeal from circuit court, Simpson county.

"Not to be officially reported."

Action by the administrator of William T. S. Kemery against the Louisville and Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. A. Mitchell, B. D. Warfield, and Edward W. Hines, for appellant.

Goodnight & Roark, Gerald T. Finn, and W. S. Pryor, for appellee.

DU RELLE, J. The administrator of Kemery brought suit to recover damages for the death of his intestate. Two jury trials have been had. Upon the first trial a verdict was returned for \$11,000, which was set aside by the court. Upon the second trial the verdict for appellee was \$8,000, upon which judgment has been entered, from which the railroad

*See generally, preceding case and foot-note.

company has appealed; and the appellee has prosecuted a cross appeal, insisting that the court erred in setting aside the first verdict, and that judgment should now be entered upon that verdict.

The petition averred, in substance, that the death of the intestate was caused by the negligence of the company, its agents, employees, and servants, in operating its trains; that Kemery was traveling in the caboose of the company's freight train bound from Louisville to Nashville, having been duly admitted to "passway" by the conductor of the train, which was running from Bowling Green to Nashville in two sections, Kemery being on the first section; that when that section reached Sinking Creek, a regular watering place for the company's trains, it stopped to take water, in the nighttime; that the company's agents negligently delayed the section an unusual and unreasonable length of time,—much longer than was necessary to take water; that they knew the second section was running closely behind them, and that the crew of the second section were ignorant of the delay of the first section, but negligently failed to give any notice or warning or signal to the second section; that the delay of the first section was much longer than the crew of the second section would reasonably expect it to be, and was unusual and unreasonable, and though the crew of the first section knew that the second section was close behind, rendering a collision probable and danger imminent, they failed to flag or signal the approaching section, or give warning to it of the delay of the first, or of the impending danger which threatened it, and by their willful negligence caused it to collide with the first section; that the crew of the second section negligently ran their train unreasonably close to the first section, and at an unreasonably rapid rate of speed, in approaching the water station, rendering it impossible of control within reasonable space, and negligently failed to exercise reasonable caution to ascertain whether the first section had left the watering place, by reason of which negligence the second section collided with the first section, running into and through the caboose and setting it on fire, whereby appellee's intestate was caught and crushed by the broken timbers and burned, receiving injuries from which he died a few hours later. By the answer the negligence averred was denied specifically. The company further pleaded its establishment of reasonable rules whereby its business as a passenger carrier was conducted separately from its transportation of freight, upon separate trains; that the train upon which appellee's intestate was traveling was used exclusively for the transportation of freight, and the carriage of passengers thereon was prohibited by its rules; that Kemery was a trespasser, and was fraudulently, wrongfully, and without right upon that train, and was not in charge of any live stock or freight or in the employ of the company, and that under its rules the only person who was, at the time of the

accident, authorized to ride on said train, other than the employees of the company, was one Isaiah Carter, who was on the train by the written permission of the company, in charge of two car loads of stock. The fraud by which Kemery succeeded in traveling upon the freight train was specifically set forth. The only testimony showing how Kemery succeeded in riding upon the train is that of the conductor and Isaiah Carter. Carter was an employee of a firm which was shipping two car loads of live stock to New Orleans, and was on the train in charge of the live stock. He had possession of two papers, called "live-stock contracts." His name was signed upon the back of each contract. These contracts authorized the person whose name was indorsed thereon to ride free on the train which carried the live stock, but did not authorize any one else to be so carried. According to Carter's testimony, taken on behalf of appellee, Kemery seems to have been riding in charge of the stock from Louisville to Bowling Green, or at least to have so informed Carter. He stated to Carter that his stock was to be left at Bowling Green, and asked to be passed on Carter's contracts to Nashville. At Bowling Green a new caboose was attached, and a new conductor took charge; Carter and Kemery entering the caboose. When the conductor came to Carter, Carter produced the two contracts; pointing at Kemery to indicate that he, also, was to ride upon those contracts. At the same time, Kemery seems to have pointed to himself, for the purpose of indicating the same thing. This was clearly a fraud. So the court instructed the jury that Kemery "had no right to be upon defendant's train at the time and place of the collision of its trains at Sinking Creek, on the 14th day of January, 1897, and was trespasser thereon; and the jury should find for the defendant, unless they believe from the evidence that defendant's servants or agents in charge of its train at the time of said collision knew that said Kemery was then in danger from a collision about to occur between defendant's trains, and by the use of ordinary care could have prevented injury to said Kemery, but that notwithstanding said knowledge, if any, of said danger, they failed to exercise ordinary care to prevent said injury to said Kemery." Two instructions were offered for appellant and refused, instruction 1 being predicated upon the theory that there was no evidence tending to show negligence on the part of the train crew of the first section. The other instruction required the jury to believe that Kemery was willfully or wantonly injured, to authorize a recovery. There was evidence to show negligence on the part of the crew of the first section. There was a sharp conflict of testimony as to the length of time the first section had remained at Sinking Creek before a flagman was sent back to flag the second section. If the jury believed the evidence of appellee's witnesses,—and they seem to have done so,—they were authorized to find that a considerable time elapsed after

through freight train while it was going at the rate of 12 or 15 miles an hour through the station of Alvord, Wise county, where the deceased lived at the time, and that he was thereby injured so that he afterwards died. We will not incumber our conclusions by setting out the testimony in full, but deem it sufficient to say that it has been carefully considered, and that we find no such evidence as required the submission of the issue of negligence to the jury. It is undisputed that by the rules of the company passengers were not allowed upon the train in question; that the conductor and brakeman were stationed at their respective stations of duty, and they both testify positively that they were not aware that Cunningham was aboard. Nor is there material conflict in their testimony to the effect that Cunningham was not discovered or seen by the operatives until just about the time he jumped or fell off the lower step of the rear end of the caboose, and until it was too late to have signaled the engineer and caused any material abatement in the speed of the train. The evidence tends to show that the deceased was drunk or drinking, and had boarded the train at a pump or watering station $2\frac{1}{2}$ miles from Alvord, while the engine was taking water, and that before the train started the conductor walked around and upon the rear end of the caboose, and there remained until after the train has passed the pumping station. It is insisted, in effect, that therefore the conductor must have seen Cunningham and observed his condition, and become effected with the duty of caring for him, and of seeing that he got off without injury. The evidence referred to may raise a suspicion of this purport, but we regard it as altogether too inconclusive in its nature to raise the issue. The pumper is the only person who testifies that he saw Cunningham at the pumping station, but he further testifies that he did not see him get on the train. The last time the pumper saw him he was some four or five car lengths from the caboose, and nothing appears in the testimony evidencing Cunningham's purpose to then become a passenger. Just how or when Cunningham attained his position on the rear end of the caboose is mere conjecture. He may have done so after the conductor entered the caboose and shut the door, or may have boarded one of the forward cars and walked back after the train started; but, however this was, the positive testimony of the operatives of the train that they did not see him get on is uncontradicted, and no attempt to impeach the witnesses was made. Besides, there was no pleading authorizing a finding of negligence on the ground that Cunningham was so drunk that he could not care for himself and safely ride on the rear platform, and that therefore the conductor, in the exercise of ordinary care, should have taken him inside or safely put him off. Furthermore, if it be conceded that the operatives knew of his presence and position on the train, we fail to find any evidence that the conductor or brakeman knew, or could have known in time to

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have avoided the injury, of Cunningham's intention to get off at Alvord. After such intention was manifest, the conductor and rear brakeman both testify, without contradiction, that it would have been impossible to have signaled the engineer and abated the speed of the train before the deceased jumped off. Cunningham was clearly a trespasser, in any view of the case, and the pleadings and the evidence developed no such case as required appellee's servants to exercise diligence to discover his presence on the train, or to care for his safety while thereon, and certainly failed to show a case of discovered peril with negligence thereafter to avoid the injury. The deceased seems to have voluntarily assumed the risk of injury arising from the circumstances, and we think it is clear that the action of the court in giving the peremptory instruction must be affirmed. Railroad Co. v. Shetter (Tex. Sup.) 59 S. W. 533, and Railroad Co. v. Haltom (Tex. Sup.) 65 S. W. 625; Rodriguez v. Railroad Co. (Tex. Civ. App.) 64 S. W. 1005.

Judgment affirmed.

BROOKS *et al.* v. PITTSBURGH, C., C. & ST. L. RY. CO.

(*Supreme Court of Indiana, Feb. 4, 1902.*)

[62 N. E. Rep. 694.]

Duty to Trespassers on Track.*

Decedent, a passenger, alighted from his train in its yards, and proceeded to a street along a route which was reasonably safe. Before reaching the street he turned suddenly from his route, crossing defendant's track, which was parallel to those of the carrier from which he alighted, and just as he reached the street was struck by an engine. The men on the engine had not perceived the decedent's peril, and he was proceeding without looking for approaching trains. There was light about the place, and a headlight on the engine which struck deceased, though the engine approached without giving signals: *held* that, as decedent was a trespasser on defendant's track, it did not owe him the duty to use ordinary care for his protection, and was not liable as for negligently causing his death.

Injury to Trespasser—Speed in Violation of Ordinance—Failure to Signal, and Contributory Negligence.

The running of an engine over a street at a speed in excess of that permitted by ordinance, without signals of warning, and without knowledge that any person was near the crossing, is not sufficient to charge the company for the willful killing of a decedent who placed himself in the place of danger immediately before he was struck.

Appeal from superior court, Marion county; John L. McMasters, Judge.

Action by Laura D. Brooks and others, administrators, etc., against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Kealing & Hugg, for appellants.

S. O. Pickens and R. F. Davidson, for appellee.

*As to duty to trespassers on track, see Puckhaber v. Southern Pac. Co. (Cal.), 21 Am. & Eng. R. Cas., N. S., 581, and note, 584.

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GILLET, J. This action was brought by the appellants against the appellee for the alleged wrongful killing of their decedent. It is not necessary to set out even an abstract of the complaint, under our view of the case. It suffices to say upon this subject that the first two paragraphs of complaint contain substantive charges of negligence, and that the third paragraph of the complaint contains a charge that the killing of said decedent was willful. Issues of fact were ultimately joined upon the several paragraphs of complaint, and the cause was submitted to a jury for trial. Upon the conclusion of the plaintiffs' evidence, the court below, upon appellee's motion, charged the jury to find for the defendant. A verdict was returned for the appellee, and the court rendered final judgment in its favor. In the appropriate manner, the appellants have presented to this court for review the question as to the correctness of the instruction above referred to. This brings us to the evidence in the case. On the night of November 26, 1896, the appellants' decedent shipped a car load of stock to Indianapolis, over the line of railroad operated by the Cincinnati, Hamilton & Dayton Railway Company. He rode in the caboose of the train, as a passenger. Upon the arrival of the train at Indianapolis the caboose was stopped at a point in the railroad yards about 500 feet west of a public street in said city known as "State Street." At that point the decedent alighted. The night was dark, and there was a high wind blowing from the north. The safest method of egress from the yards was to proceed eastward to State street, and he chose that method, walking alone the space between the track that his train had lately passed over, and the track denominated as the "C., H. & D. Main," until he arrived at a point about 15 feet west of State street. The track next to the north of the one last mentioned belonged to the appellee, and was denominated by witnesses in the case as the "North-Bound Panhandle Main." There were also three other tracks in the yards. All of the tracks were about 12 feet apart, measured from center to center; thus leaving a space about 8 feet in width between each track. So far as the evidence suggests, there was, under the existing circumstances, a reasonably safe path, along the route chosen by the decedent, from the caboose to State street. There was an arc light on State street, 24 feet north of the north-bound Panhandle main, but the plaintiffs' witness who testified to that effect further testified that he did not remember whether it was burning on that night or not. There must have been enough artificial light, however, for the decedent to see his way, because there was the light from the headlight of a switch engine that was being used to switch cars at a point to the east of him, some 350 or 400 feet from State street, and also the light from an ordinary headlight upon the rear of the tender of a switch engine that was approaching State street from the west on the north-bound

Panhandle main. Besides, the plaintiffs introduced a number of witnesses who testified that they observed the course of the decedent as he approached State street. The switch engine last mentioned was running backwards, and proceeded to and over State street at a rate of speed approximating 12 or 15 miles an hour. There was no watchman upon the rear of this engine, although an ordinance of the city of Indianapolis so required. The engine was running faster than another section of the same ordinance permitted. It may be fairly claimed under the evidence that the jury might have concluded therefrom that the whistle was not sounded or the bell rung. A witness for the plaintiffs testified that when said engine was five or six car lengths east of State street he observed that the fireman, whose seat was on the south side of the engine, was leaning over towards the engineer, and apparently talking to him; but an examination of the bill of exceptions has not disclosed to us any evidence as to whether either engineer or fireman were or were not observing the conditions upon or near State street as they approached it. One witness testified that he observed three men upon the street crossing, but whether they occupied positions where they were in any wise in danger from said approaching engine does not appear. There is evidence to the effect that there was nothing to prevent the engineer and fireman from seeing the decedent, had they looked. On the other hand, the evidence shows that, when the decedent reached the point 15 feet west of the street crossing, he could have had an unobstructed view of the track on which said engine was approaching for a distance of 200 feet to the west of State street. When the decedent was within 15 feet of the State street crossing he turned in a northeasterly direction, and proceeded in that direction, crossing the C., H. & D. main, until he reached the edge of the planking that marked the southwestern intersection of said street with the said north-bound Panhandle main. At that point he was struck in the face by a hand rail on the rear of the fender of the engine that was approaching the crossing upon said track. He was thrown backwards, and received injuries from which his death resulted. The manner of his approach is thus described by appellants' witness Steading, whose testimony is wholly uncontradicted: "Q. I wish you would describe to the jury, as nearly as you can, the way he was walking; that is, say from the time you first saw him and on up until the time that he was struck,—the position of his head or his face, if you can tell? A. Well, it seemed to me that he was just the same as a man in a study. He had his head kind of stooped over. He kind of had his head down. Well, he didn't appear to realize what he was at, at all. Q. 115. Wasn't that particularly so as he turned to the north, facing the wind? A. Well, it might have been. I could see him plain,—that his head was kind of down, and he kept swinging his arm rather fast, with his umbrella in it. I could

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see him plain between me and the headlight." And upon cross-examination the further testimony of the witness upon this point was: "Q. He [the decedent] had left the caboose when you saw him? A. Yes, sir. Q. And was coming towards you, about 200 feet away? A. Yes, sir. Q. When he was 200 feet away, could you see the Panhandle engine coming? A. Yes, sir. Q. Was the light burning on that end of it? A. Yes, sir. Q. Was there anything between Mr. Brooks from the time you saw him there, some 200 feet west of the crossing, until the time he got struck, to prevent him seeing the engine if he had looked? A. No, sir. Q. Did he look from the time you saw him until he was struck? A. No, sir. Q. He had his head down, seemingly in a study, from the time you saw him until he was struck? A. Yes, sir; he seemed like a man walking towards the wind,—to kind of protect himself from the wind. Q. And he didn't look west along the track at all from the time you saw him, 200 feet away, until he was struck? A. No, sir; he didn't seem to." There is evidence that it was, and had been for a long time, the custom of the Cincinnati, Hamilton & Dayton Railway Company to discharge stockmen from its cabooses at various points west of State street, but what means of egress they took in leaving the yards does not appear. The evidence shows that the decedent was an active, intelligent man, and there is no hint in the evidence that he was not in the full possession of all his senses. Some further evidence, not relating to matters now in controversy, was introduced. With this exception, this opinion contains a statement of the substance of the evidence in the case.

Appellants' learned counsel properly concede that, if this court holds that the decedent was a traveler upon the street, the appellee is not liable under the paragraphs of the complaint charging negligence. We presume that this concession is prompted by a realization of the fact that the decedent did not observe a traveler's duties. They cite many authorities, however, upholding the duty of a carrier of passengers to provide and maintain safe alighting places, and also safe means of egress therefrom, but they overlook the fact that the authorities they cite relate to the obligations of the carrier company. This is not a case like *Railway Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193, and *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323. In those cases the original plaintiff therein was injured while proceeding in the nighttime along a platform extending from one railway station in the direction of another. Each company had constructed the portion of the platform that was upon its own grounds, but it was so joined together as to constitute an apparently continuous platform. The plaintiff in said cases received her injury upon the grounds of the Pennsylvania Company; having, as a passenger, alighted from a train of the Louisville, New Albany & Chicago Railway Com-

pany for the purpose of proceeding to the railway station of the Pennsylvania Company, there to take a train on its railroad. This court, in the case last cited, very properly said: "She was not an intruder as to either, but was entitled to protection from both." The difference between the facts in the cases cited and in the case at bar is obvious. Here the decedent alighted in a railway switch yard. There was nothing to suggest common ownership of the various tracks that were there, and he proceeded to the track of the appellee, where he received his fatal injury, not for the purpose of entering into the relation of carrier and passenger with it, but as a matter of mere convenience to himself. In the case of *Railroad Co. v. Griffin*, 100 Ind. 221, 223, 50 Am. Rep. 783, Mitchell, J., in pronouncing the opinion of this court, said: "An owner may not, by invitation, either express or implied, induce another to come upon or pass over his premises, without keeping them in such condition of safety as to admit of his passing over by the means designated or prepared without injury, provided he uses due care. To make the owner or occupant liable for an injury received by one passing over his premises, something more than a mere passive acquiescence in the use of his land by others is necessary. So long as his lands are used by others, be it ever so frequent, for their own convenience, he is not liable. But if, by some act or designation of his, persons are led to believe that a way or path was intended to be used by travelers or others having lawful occasion to go that way, then as to such persons the owner or occupant comes under an obligation to keep it free from dangerous obstructions or pitfalls which might cause them hurt. The inducement must be equivalent to an invitation, either express or implied. Mere permission is not sufficient." This doctrine finds late expression in the case of *Cannon v. Railway Co.* (Ind. Sup.) 62 N. E. 8. Appellee had not invited the decedent to go upon its track. It had not even consented thereto. And it is not bound to mark its property lines, as against the passengers of the Cincinnati, Hamilton & Dayton Railway Company. It may be that the decedent had no knowledge that he was committing a trespass, but, even if he was but a technical trespasser, his administrators can assert but a wrongdoer's rights. At the basis of every well-grounded action for negligence must lie a legal duty to use care. *Railroad Co. v. Griffin*, supra; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; *Cannon v. Railway Co.*, supra; 1 *Shear. & R. Neg.* § 5 et seq. Moreover, if the appellee owed a duty, but did not owe it to the decedent, this action by his administrators will not lie. 1 *Shear. & R. Neg.* § 8; *Daugherty v. Herzog*, supra; *Cannon v. Railway Co.*, supra. Treating the decedent as a trespasser upon the right of way of the appellee, as we must do, if we grant the claim of appellants' coun-

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sel that he was not a traveler upon the street, and it results, as the appellee was entitled to the exclusive possession of its right of way at that point, that it did not owe to the decedent (there being no evidence that his peril had been perceived by the men upon the switch engine) a duty to use ordinary care for his protection, and therefore there is lacking an essential element of negligence. We are constrained to hold that there can be no recovery under either the first or the second paragraphs of the complaint.

It only remains to consider the rights of the appellants' decedent under the third paragraph of the complaint, that, as heretofore stated, contains a charge of a willful killing. A trespasser is not an outlaw, and it is within bounds to state that it is actionable to willfully injure such a one. *Cannon v. Railway Co.*, supra. But inasmuch as appellants' counsel are by no means conceding that there is no liability under the third paragraph of the complaint if the decedent was killed while upon the street, we prefer to examine the question as to whether the killing of decedent was willful, upon what is probably the true assumption, namely, that at the moment of the collision he had stepped from a place where he was a wrongdoer to a place where he could no longer be characterized as a trespasser. This court has frequently quoted approvingly the following definition of "willfulness" given by Mitchell, J., in *Railway Co. v. Bryan*, 107 Ind. 51, 53, 7 N. E. 807, 808: "Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury. Or it must appear that the injurious act or omission was by design, and was such—considering the time and place—as that its nature and probable consequence would be to produce serious hurt to some one. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evidenced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal." Even a more pertinent statement of the law upon this subject is found in *Parker v. Pennsylvania Co.*, 134 Ind. 673, 679, 34 N. E. 504, 506, 23 L. R. A. 552, where it is said: "Willfulness does not consist in negligence. On the contrary, as illustrated by the cases of *Bryan* and *Mann*, heretofore cited, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such degree as to become willfulness." See, also, *Railroad Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719, and *Railway Co. v. Miller*, 149 Ind. 490, 49 N. E. 445, for forceful statements of the law upon this subject. While

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we grant that the act of the appellee would have amounted to negligence, but for the reason heretofore stated, yet we deem it clear, beyond peradventure, that the act of appellee was not willful. The result of running a locomotive over the crossing in question at the rate of speed of 15 miles an hour, without sounding the whistle or ringing the bell, would not ordinarily be to injure travelers upon the street, because their own instincts of self-preservation would cause them to be on their guard in crossing the railroad track. The case, therefore, does not come within the definition of "willfulness" declared in *Railway Co. v. Bryan*, *supra*,—that there must be an express intent, or that the injurious act or omission must be such that "its nature and probable consequence would be to produce serious hurt to some one." It must be borne in mind that, while the evidence tends to prove that the appellee's servants were heedless of the rights of persons who might be upon the crossing, yet there is no evidence that such servants had knowledge that any person was upon or near the crossing. Indeed, it may be inferred from the evidence that they passed over the crossing without knowledge that an accident had happened. It must be remembered, also, that the particular peril that eventuated in the death of the decedent was a matter of but little more than a moment. The switch engine, if it was approaching the crossing at the rate of 15 miles per hour, was running 22 feet per second, and even the last second before his injury afforded time sufficient to carry decedent from a place of comparative safety to a situation of imminent peril. There was therefore no opportunity, after decedent's danger of harm was imminent, even if he was perceived by appellee's servants upon the switch engine, for their minds to change from an attitude of heedlessness to that of violence.

The question presented to the trial court upon the close of appellants' evidence was, under the circumstances, plainly one of law, and its act in directing a verdict in appellee's favor was proper.

The judgment of the court below is affirmed.

GRAHAM v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Arkansas, Feb. 2, 1901.*)

[65 S. W. Rep. 1048.]

Right of Way—Effect of Permitting Grantor to Use Part of Land.

Where, in procuring the right of way for road, depot grounds, and a wye, a railroad company purchased such right in a larger tract of land than it had immediate use for, "to have and hold so long as said lands are used for the purposes of a railroad, and no longer," it did not lose its right to any of the land by permitting the grantor to use so much as the company was not using until the company should need it.

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Same—Title by User.*

Where a railroad company purchased land for right of way, depot grounds, and a wye, to connect with another road, and, not needing the wye for several years, took actual possession only of the right of way and depot grounds, the vendor or his heirs could not acquire title by user of the remaining land until they had notified the company that such user was adverse.

Same—Same—Direction of Verdict.

Where, in an action to recover possession of land, defendant admits that it was conveyed to plaintiff, and pleads a forfeiture and adverse possession, but the evidence does not sustain such defense, it is not error to direct a verdict for plaintiff.

Same—Ejectment—Damages.

Where a railroad company purchased land for a right of way and depot grounds, taking a deed "to have and to hold so long as used for railroad purposes, and no longer," it had the exclusive right of possession, and can maintain ejectment against one holding adversely.

On Rehearing.**Passive Use of Railroad Land by Grantor—Damages.**

Where a grantor and his heirs are allowed to and use land conveyed to a railroad company until needed by the road, they are not chargeable with damages for such use before they notify the company that they claim adversely to it.

Appeal from circuit court, St. Francis county; Hance N. Hutton, Judge.

Action by the St. Louis, Iron Mountain & Southern Railway Company against W. S. Graham. From a judgment for plaintiff, defendant appeals. Affirmed conditionally.

Norton & Prewett, for appellant.

Dodge & Johnson, for appellee.

RIDDICK, J. This is an action of ejectment brought by the railway company to recover 12 acres of land which the ancestor of defendant had sold and conveyed to the company for railway purposes. The defendant contends that all the right and interest in this land conveyed to the company by the deed of his father was forfeited by reason of a failure to comply with a condition in the deed. The clause of the deed referred to is as follows: "To have and to hold the same to the said party of the second part so long as said lands are used for the purpose of a railroad, and no longer." The proof shows that the railroad was built, and that the company has continuously used the greater portion of the land conveyed for the purposes mentioned; but because it has not built upon and occupied the 12 acres of the tract in controversy, the contention is made that it was forfeited by virtue of the provision in the deed above quoted. In determining the meaning of this clause in the deed, we can look to the circumstances under which the deed was made. The land was conveyed to the company before it had constructed its road on the land to be

*As to whether title by adverse possession can be acquired against a railroad company to lands originally acquired by it for railroad purposes, see *Pittsburg, etc., Ry. Co. v. Stickley* (Ind.), 20 Am. & Eng. R. Cas., N. S., 148, and note, 151 et seq.

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used for depot grounds, right of way, side tracks, and wye, which it expected to construct in the future. The proof shows that the company, looking to the probable future needs of the road, purchased and paid for more land than it needed for immediate use, though not more than it would probably need in the future. Construing the language of the deed in the light of these circumstances, we think there was no forfeiture. The condition was complied with on the part of the company by constructing its railroad upon and across the land conveyed, and putting so much of said land as its immediate needs required to use for depot grounds and side tracks (that being the greater part of the tract), and by holding the remainder for the future needs of its railroad; in the meantime not putting it to another or different use. This land was not given to the company to secure the erection of shops, or something of that kind. It was purchased and paid for by the company, which afterwards constructed its railroad as set out in the deed. If the construction of the road was a part of the consideration of the deed, the grantors have secured that advantage. They were not in any way interested in the construction of the wye or side tracks for which the company now wishes to use the land in controversy. The delay in constructing it did not operate to their injury, but, on the contrary, they were thus permitted to use and cultivate the land several years longer, and thus gained an advantage by the failure of the company to put the whole tract to immediate use. Conditions subsequent are not favored, and must be strictly construed, and we see nothing in this deed that required that the whole tract should be at once used for railroad purposes. We think the ruling of the circuit judge on this point was correct, and the contention of appellant must be overruled.

The next question is raised by defendant's claim of title by adverse possession. On this point the circuit judge held that a vendor could not defeat the right of his vendee by adverse possession, and that the same rule would apply to the defendant, who holds under the will of his father, one of the vendors. He thereupon directed the jury to find for the company on the issue of adverse possession. Considered abstractly, this statement of the law as given by the trial judge was not correct. Though the continued possession of the land by the vendor after conveyance executed is not of itself sufficient to show a holding adverse to the vendee, yet there is nothing in their relations which will prevent the vendor from acquiring a title by adverse possession. But before the vendor, or those claiming under him, can acquire title in that way against the vendee, the intention to hold adversely must be manifested by some unequivocal act of hostility, such as to give notice to the vendee of the intention of the vendor to deny his right and hold adversely to it. Until this is shown, the statute does not commence to run. 1 Am. & Eng. Enc. Law (2d Ed.) 818,

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819; Connor v. Bell, 152 Pa. 444, 25 Atl. 802; Paldi v. Paldi, 84 Mich. 346, 47 N. W. 510; Sherman v. Kane, 86 N. Y. 68. The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are in themselves, in the absence of explanatory evidence, proof that the holding is adverse, whereas, if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendor intends to deny the title he has conveyed. Now, in this case, we see no evidence of any unequivocal act of hostility on the part of the defendant against the rights of the company sufficient to put it upon notice of an adverse claim until shortly before the commencement of this action, when the defendant, speaking to an agent of the company, denied that it owned a right of way across his field. This was notice to the company, but previous to that the evidence shows no act of defendant so inconsistent to the right of the company as to bring to it notice of an adverse claim. So far as the land in controversy is concerned, there was no change in possession after the execution of the deed to the company. While the company was using other portions of the tract conveyed, it had no immediate need for this part, and suffered it to remain within the inclosure of the grantor, and to be cultivated by him. After the death of the grantor his son, the defendant, took possession, and continued to cultivate it, and to clear and put in cultivation a small portion that was in timber. The company had no right to farm the land, or to use it for other purposes than those named in the deed; and, until it was actually needed for the purposes of the railroad, there was no reason why it should object to the use of it by defendant. This use of it did not injure the company. On the contrary, such cultivation, by removing timber, stumps, and other obstructions, would naturally tend to its benefit. The possession of the vendor and his son was to the mutual benefit of the company and themselves, and was not in any way inconsistent with the rights of the company under the deed. We are therefore of the opinion that the circuit judge did not err in holding that there was no evidence of an adverse holding shown.

But counsel for defendant earnestly contends that the judgment should be reversed because, as he says, the instructions given by the trial judge prevented him from being heard on the facts. We cannot agree with this contention. Defendant admitted that his ancestor had conveyed this land to the railway company, and pleaded a forfei-

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ture and adverse possession as defenses; but, as before stated, he showed no forfeiture, nor any overt act of hostility to the title of the plaintiff, calculated to put it upon notice of an adverse claim, until only a few days before the action was commenced. There was therefore, in our opinion, no question of fact to submit to the jury, and it was totally immaterial what the form or language of the instruction was by which the trial judge directed a verdict for plaintiff; the evidence making it plain that a direction to find for the plaintiff was proper. Whether that was accomplished by a simple direction to so find, or by an instruction which effected the same result, is quite unimportant; for no prejudice resulted to defendant from the form of the instruction. Courts do not sit to settle abstract questions of law, but to determine rights of parties involved in the litigation; and, when it is clear that those rights have been correctly adjudicated by the trial courts, the judgment should be affirmed, notwithstanding there may have been formal defects in the charge to the jury. The substance of the instructions in this case was that there was no adverse holding, and this, we think, was correct.

Under the peculiar language of this deed, we are not sure that the company took more than an easement in the land; but a railroad right of way, though an easement, gives the company the right to exclusive possession, and it may maintain ejectment against one wrongfully holding possession of its right of way. *Tennessee & C. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 524, 51 Am. Rep. 475.

Though it is doubtful whether the company had any right to recover for the value of the use and occupation of the land prior to the notice to quit, still that question does not seem to be raised or presented in the brief.

On the whole case, we think the judgment should be affirmed, and it is so ordered.

On Rehearing.
(Dec. 7, 1901.)

WOOD, J. The complaint alleges that plaintiff is the owner and entitled to the possession of the land in controversy; that the land was conveyed to it for right of way and depot purposes by deed. The deed is exhibited. The complaint then alleges that the defendant is in possession of the land, and is unlawfully withholding same from the plaintiff. The answer alleged that plaintiff had lost all right and title to the land by forfeiture, for noncompliance with the condition subsequent contained in the deed; i. e. that it should use the land for railroad purposes. It further alleged the adverse possession of defendant for more than seven years. The issue fairly and squarely raised by the complaint was whether the appellee was the owner and entitled to possession of the land in controversy under its deed, which, the complaint declared, conveyed the land for right of way and depot purposes. No more specific declaration was necessary to

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show that the appellee was suing for the land for railroad purposes. This issue was joined by the answer, setting up that the plaintiff had forfeited its right under the deed, and by claiming adverse possession for the appellant; thus setting up affirmatively title in himself, and thereby denying title and the right of possession in the appellee for any purpose. In *Morgan v. Moore*, 3 Gray, 319, it is said: "The right to a fee and the right to an easement in the same estate are rights independent of each other, and may well subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right,—the former to protect and enforce his seisin of the fee; the latter to prevent a disturbance of his easement." Giving force and meaning to every word and clause in the deed, the most reasonable construction is that deeds of the kind under consideration convey a perpetual easement in the land, or an easement in the nature of a fee. Neither the intention nor the effect of such instruments could be the conveyance of an estate in fee, but only an incorporeal hereditament,—an easement. *Robinson v. Railroad Co.*, 59 Vt. 426, 10 Atl. 522; *Flaten v. City of Moorhead* (Minn.) 53 N. W. 807, 19 L. R. A. 195; *Barlow v. Railroad Co.*, 29 Iowa, 276; *Big Mountain Imp. Co.'s Appeal*, 54 Pa. 361; *Blakely v. Railway Co.*, 46 Neb. 272, 64 N. W. 972; *Williams v. Railway Co.*, 50 Wis. 71, 5 N. W. 482. The deed itself contains no limitations or conditions upon the investment or enjoyment of the easement. The easement having been acquired by deed, in the absence of statutory provisions, or some stipulations in the deed itself, prescribing the time when the grantee should exercise its right by constructing and using its road, no mere nonuser could have the effect of defeating the right. But adverse possession by the owner of the fee for the statutory period would extinguish the right granted. *Washb. Easem.* 717; *Elliott*, R. R. § 931; *Kansas City & S. E. Ry. Co. v. Kansas City & S. W. Ry. Co.*, 129 Mo. 62, 31 S. W. 451; *Roanoke Inv. Co. v. Kansas City & S. E. Ry. Co.*, 108 Mo. 50, 17 S. W. 1000. In the case at bar mere nonuser by the appellee is all that is claimed. No affirmative act of abandonment, such as misuser, conveyance for other uses, etc., is insisted upon as a cause of forfeiture.

On the question of adverse possession we do not wish to add to our former opinion. The possession of appellant was perfectly consistent with that of appellee until he gave actual notice to appellee of his adverse holding. From that moment appellee had a cause of action to protect its right of easement,—not before.

It follows from what we have said that the instructions of the court were based upon an erroneous construction of the deed. The law applicable to the issues raised by the pleadings and proof was not given. The judgment for any amount beyond mere nominal damages was inconsistent with the views we have expressed, because the proof showed that adverse possession did not commence until just before the suit

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was instituted. But notwithstanding the erroneous views of the law announced, it is obvious that under a proper construction of the deed, and a correct announcement of the law applicable to the undisputed facts, the verdict and judgment could not have been different as to appellee's right of possession. The judgment giving appellee the right of possession for railroad purposes will therefore be affirmed. As to the damages, all possible prejudice of appellant growing out of the judgment for damages can be removed by a remittitur of all in excess of a mere nominal amount. If the appellee will, therefore, remit within 10 days all except \$1, the judgment for damages will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial as to the damages.

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(*Supreme Court of Appeals of West Virginia, Dec. 14, 1901.*)

[40 S. E. Rep. 407.]

Estoppel—Judgment by Default.

A judgment by default, agreement, confession, or trial is an estoppel against the relitigation of all such direct questions as were or might have been in issue and determined thereby, in a collateral proceeding in equity between the same parties.

Right of Way—Cannot Be Shifted without Consent of Grantor.

Where the grant of the right of way 50 feet wide to a railroad company calls for a certain, fixed, and determined center line, the construction of the track on either side of such center line will not shift such center line to the center of such track, and thus shift such right of way, without the consent of the grantor.

Same—Burden of Proving Proper Location of Tracks.

In a suit involving the true location of such right of way, the burden is on the railroad company to prove that either it constructed its track on such center line, or that the grantor consented that the center line might be shifted to the center of such track, wherever located.

Location of Tracks.

A railroad company is not bound, without covenant to that effect, to construct its track on the center line of its right of way.

Right of Way—Sufficiency of Title Bond.

A title bond, duly acknowledged and recorded, conveying a full and free right of way, 50 feet wide, with the necessary ground for cuts and fills, to a railroad company, for railroad purposes, without reservation, is a sufficient grant of such right of way, under the laws of this state.

Real Estate—Power of Railroad to Acquire Title by Adverse Possession.*

A railroad company can acquire title to property by adverse possession.

Equity.

In a case of grave doubt, equity will not grant relief, but will leave the parties to their legal remedies.

Same—Laches.

Laches alone is sufficient to bar equitable relief, especially when it has been so long continued as to render the relief sought doubtful, uncertain, unfair, or unjust.

(Syllabus by the Court.)

*See *Hanlon v. Union Pac. R. Co.*, 40 Neb. 52, 1 Am. & Eng. R. Cas., N. S., 701; 1 Rap. & Mack's Dig. 33 et seq.; 7 Id. 76 et seq.

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Appeal from circuit court, Wood county.

Bill by the Ohio River Railroad Company against William Johnson, Jr. Decree for plaintiff, and defendant appeals. Reversed.

Dave D. Johnson and Okey Johnson, for appellant.

Harry P. Camden, for appellee.

DENT, J. An appeal from the circuit court of Wood county taken by Wm. Johnson, Jr., to a decree rendered on the 27th day of April, 1899, in a chancery suit wherein appellant was defendant, and the Ohio River Railroad Company was plaintiff. In its bill and amended bill the plaintiff alleges: That in April, 1882, its right of way for a railroad was obtained from the defendant, through his farm, 50 feet wide, with necessary ground for cuts and fills, according to the original line of such road as surveyed by Engineer Wharton. The grant was reduced to writing, and signed and acknowledged by the defendant. Afterwards there was a slight addition added thereto, as follows: "It having become necessary in the construction of above railroad to use certain ground to deposit waste dirt, and also to move the fence along the line of same, and also being necessary to destroy some fruit trees in the grading and protecting the gravel bank mentioned above: Now, therefore, as a consideration of the same, the said railroad company have paid to said Johnson the sum of one hundred dollars, the receipt of which the said Johnson hereby acknowledges, and the said Johnson waives all objections to use of said land and destruction of said trees, and agrees to remove said fence at his own expense." That there was a provision in the grant that "it is understood and agreed that the said railroad company must either build said roadbed far enough from the gravel bank underneath which the line runs, so as to keep said bank from washing, or shall protect said bank by a wall, or in some way prevent said washing." That it was found impracticable to build such road without cutting through such gravel bank, which the company did, and exposed it to washing. That in March, 1886, the defendant instituted an action for damage against the plaintiff for failing to comply with the covenants of grant, and for constructing the line of its said road outside of the 50 feet granted it according to the Wharton survey or line. That said suit was compromised by the defendant agreeing to let a judgment be entered for \$800. The plaintiff claims that this judgment was a satisfaction for the failure to perform its covenants, and that by reason of the payment of the damages, and the possession of the road outside of the line surveyed by Engineer Wharton, it acquired the absolute title to the 50 feet of land of which its railroad, as constructed, formed the center line, without regard to the Wharton line, and that it was entitled to a deed therefor from the defendant, and that the defendant also agreed thereby to the change

in its right of way thus made; that the change thus made was the mere shifting of the center line of the entire right of way, to the extent of the change aforesaid, against said gravel bank, from the former location on the bottom on the river side of said center line; that at the north end of the farm of the defendant is an orchard; that plaintiff instituted a suit to condemn a portion of the same for the sand and gravel; that it had the damages estimated by commissioners, and paid the amount (\$300) thereof into court, the defendant demanding a jury trial, and plaintiff, while such condemnation proceedings were pending, entered upon such land and removed such sand and gravel. The proceedings were dismissed and abandoned because the court held that an orchard could not be condemned. The defendant then instituted a suit to recover the value of the sand and gravel taken from his land during the pendency of the condemnation proceedings. The plaintiff then had an accurate survey of its roadbed made, and ascertained that the sand and gravel so taken were inside the 50-foot limit, including the necessary cuts or slopes to make it level, treating its railroad as constructed as the center line of such right of way; and it therefore prayed an injunction to such suit at law, and asked that defendant be required to make a deed to it for such 50-foot strip, with its road as the center line, whether it corresponded with the Wharton survey or not. Defendant answered, admitting nearly all the allegations of the bill. He admitted that the railroad, as constructed, was not only off the Wharton survey, but was to some extent, and especially at the place where the sand and gravel were removed, entirely outside of the right of way which he had agreed to convey to the plaintiff. He admitted that his acquiescence for so long a period of time, although under protest, and recovery of damages, would give the company the right to hold the land on which its roadbed is constructed, but alleged that it did not give it the right to go beyond the 50 feet, with necessary cuts and fills, subject to the provision as to the gravel bank originally granted; that the confession of judgment and condemnation proceedings estopped the plaintiff from claiming ownership of the land from which the sand and gravel were last taken. On a hearing of the controversy the circuit court decided for the plaintiff, and required the defendant to make a deed to the plaintiff covering a strip of ground 50 feet wide through the land, with ground for necessary cuts and fills, with the road as at present located as the center line.

There are but two propositions presented by this controversy, the establishment of both of which is on the plaintiff, and they must be cleared of all doubt before specific performance can be granted: (1) Is the center line of the railroad track, as now located, on the original Wharton line, or substantially so? (2) If it is materially off of that line, did the defendant agree to the change, and thereby agree that the

whole right of way should be shifted so as to make the center line of the track as now constructed the center of such right of way?

As to the first proposition there can be no doubt. The vast preponderance of evidence, and the confessions and admissions of the plaintiff by record and outside of the record, fully establish the fact that in the construction of the road the Wharton line was virtually abandoned. Not only so, but that the road, to some extent, at least, was constructed outside of the right of way, as it would have been had the Wharton line been adhered to. It is true that there is some evidence to the contrary, and certain surveyors in the employ of the plaintiff, by reliance on what they call the "Slope Notes," have endeavored to show that the Wharton line has not been materially departed from. But the solemn admissions of the plaintiff in its confession of judgment, in its condemnation proceedings, in its original and amended bills in this case, and in its failure to produce the original plats of the right of way as made by its surveyor, showing a decisive weakness, where the law requires it to be strong, the evidence of one of the original surveyors, sustained by the preponderance of the oral testimony, places the matter beyond doubt or quibble. Nor is the plaintiff any stronger on the other proposition. It shows no contract, agreement, or arrangement on the part of the defendant to permit the location of the road to change the center line of the right of way, and thus shift the whole right of way. In other words, the right of way as granted was not movable, but was solid to the center of the earth. The plaintiff had the right to place its track in the center or either side thereof, so long as it did not interfere with the defendant's gravel bank; and, in case it did, it was the plaintiff's duty to protect it from washing by stone wall or otherwise. This provision was undoubtedly intended to be a limitation as to cuts and fills, and was a restriction in so far as said gravel bank was concerned. It certainly was never intended by the grantor that the plaintiff should cut away the front of this bank, and then, instead of building a stone wall or affording some other protection, cut it back to a slope of $1\frac{1}{2}$ to 1 as a protection. If such was the intention, the stone-wall provision was simply useless and nugatory. To get at the true meaning of the grant, it must be viewed as a whole, and not in isolated parts. As to any actual agreement as to the change of the right of way, there is no proof whatever. It is true, the defendant stood by, and, under protest, permitted the defendant to construct its road off of the right of way already granted, and has allowed it to remain in its exclusive control and possession so long that he cannot now make it remove the road, or claim such portion of the land outside of the right of way of which the plaintiff has had actual, notorious, and exclusive possession under a claim or color of

title for over 10 years; but this does not extend to such land as it has not had such actual, notorious, and exclusive possession of for over 10 years, so as to enable it to make cuts and fills and slopes beyond the lines of the original grant. In so far as it is off its right of way, it cannot claim ground for cuts and fills under its original grant, for the reason that it does not include and cover such ground.

The plaintiff insists that while there was no express agreement that such right of way should be changed, yet the defendant, by his conduct in standing by and permitting the road to be constructed along some other line than on the center of its right of way, and by suing and recovering damages for the sand and gravel removed, estopped himself from objecting to the shifting of the right of way, and that therefore he could be compelled to deed it such right of way. There is nothing to show that defendant had any knowledge that the construction of the track out of the center of the right of way as granted would thereby shift such center to the center of the track wherever it should be located. Nor is such the law, for a railroad has the right to construct its track along any line within its right of way, and the defendant could not object thereto. Nor is 50 feet in width required for only one track, but there is room for a double track and such side tracks as the corporate business may demand. The character of the ground, especially in the construction of a new railroad, may require the construction of the road, for convenience, to save expense and avoid slips, temporarily at least, at one side of the right of way, and not in its center; and also a change in the curvature of the road may so require. The suit shows that he was resisting its encroachments beyond the right of way, and the recovery therein shows that he was in the right, and it was in the wrong, and operates as estoppel to its claim that it was not encroaching upon his land beyond its grant. *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633; *Sayer's Adm'r v. Harpold*, 33 W. Va. 556, 11 S. E. 16; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809; *Tracy v. Shumate*, 22 W. Va. 475; *Corrothers v. Sargent*, 20 W. Va. 351. In that suit this plaintiff could have the very questions tried now involved in this litigation, to wit, the true location of the Wharton line, and the right of the plaintiff to take the gravel and sand. If taken from plaintiff's land, such fact could have been as well established then as now. Plaintiff cannot complain that it did not then have the title in fee. For it could have just as well filed its bill then as now, and better, because then the evidence would have been clearer in the minds of witnesses, and the plats of the right of way might not have then been lost. A confessed or agreed judgment operates as fully as an estoppel as a judgment on the verdict of a jury. 21 Am. & Eng. Enc. Law, 267. The payment of the damages did not take away the defendant's right to the land, but established it thereto, and destroyed plaintiff's claim, if any. Nor did

it take away defendant's right to have the gravel bank protected by a stone wall or otherwise, as the plaintiff appears to claim. For the defendant, in his account filed with his declaration in that suit, claimed pay for "60,000 cubic yards of earth taken from the land of defendant along the line of plaintiff's road, at 5c. per yard, \$3,000.00." Plaintiff agreed that judgment might go for \$800 and costs, and paid the same. This does not release the plaintiff from protecting the gravel banks with a stone wall in the future, nor does it transfer to it the land from which the gravel and sand were taken. The adjudication is entirely in favor of the rights asserted by the defendant, and against the rights that might then have been asserted by the plaintiff in defense of that action, and which are asserted in this, except such as were raised by the adjudication. Defendant is not estopped from claiming future damages to his gravel bank by failure of the plaintiff to protect the same from washings caused by its unlawful removal and cuttings into such bank. For he did not sue for prospective damages, but only such as had occurred up until the time of his suit, and these were all he could recover. Nor did plaintiff acquire title to defendant's land by payment of those damages, for the suit was not for the value of the land taken, but only the sand and gravel actually removed. *Watts v. Railroad Co.*, 39 W. Va. 201, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Suth. Dam.* §§ 1016, 1017; *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Anderson v. Kernodle*, 54 Ind. 314; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42. The title to lands does not pass by judgment for plaintiff in an action of trespass. It remains in the plaintiff, and he can bring subsequent actions for the continuance of a nuisance against the same. *Thompson v. Banking Co.*, 17 N. J. Law, 480; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474. A recovery in the first action establishes the plaintiff's right, and subsequent actions may be brought for a continuance or repetition of the wrong. *Bare v. Hoffman*, cited. Defendant's suit was therefore a protest against the plaintiff's location of its road off of the right of way granted, and plaintiff's agreement to a judgment therein was an admission that such protest was well founded, and by the payment of the judgment it acquired no title to any of the defendant's land. It is true that defendant did not undertake or eject plaintiff from his land, but by suit, by written notice, and word of mouth he continued to protest against the plaintiff's unlawful occupancy thereof. In August, 1883, the defendant presented to the plaintiff a bill for earth unlawfully removed from his land beyond the 50-foot strip granted, and at the same time notified it not to remove any more earth outside of such strip on the plea of necessity. He also plainly notified it that the road was not built on the line staked by Engineer Wharton. This was shortly after the road had been constructed, when everything was fresh in the minds of the

witnesses, when the surveyors who located the line were still to be had, and before the plaintiff had lost the plats of the different rights of way. Fully warned, this was the time the plaintiff should have demanded its deed and permanently located the corners of its right of way, and, on failure to get the same, instituted its suit in chancery. Such laches alone ought to defeat this suit, and is certainly a strong circumstance in establishing the fact that the plaintiff was fully aware of and knowingly abandoned the Wharton line, and was endeavoring to shift the whole right of way further to the east, on the lands of the defendant not included in his grant. On May 14, 1886, the defendant again notified the plaintiff in writing not to take sand, gravel, or earth from his land, and then instituted the suit before mentioned to recover the value of the earth already taken, to which the plaintiff virtually confessed judgment, and admitted the wrong done. But, not satisfied with this, the plaintiff continued its trespasses against the defendant in spite of his suits and protests. He was again forced to sue it, and then, after the lapse of 14 years, when memory has become blurred, monuments obliterated and destroyed, papers misplaced and lost, witnesses scattered and dead, and the defendant on the verge of the grave, instead of meeting him in a spirit of equity and justice, for which he so earnestly pleaded, it asks a court of equity to make a deed in fee simple for a tract of land it never purchased, never condemned, nor acquired in any legal manner, but which it appropriated, by successive trespasses and breaches of its covenants, to its own uses. A more inequitable and unjust plea could not be presented in any court. While a railroad company oftentimes deserves sympathy for the unjust manner in which it is treated by the landowners on either side of its right of way, occasionally the disregard of its overzealous officers and agents of private interests brings such corporations into bad repute, secure for them the enmity of those who should be their best friends, and lay them open to the sometimes just or unjust charge of being unconscionable exploiters of others' rights. By condemnation proceedings, which it knew it had no right to bring, because it sought the taking of an orchard, it held the defendant bound until it stripped a portion of his land of its sand, gravel, and soil, and now asks a court of equity to give it a title in fee simple for the stripped land, to enable it to escape the payment of damages for its unlawful encroachments. What makes the matter more inequitable is the fact that the sand, gravel, and earth were not necessary to, nor used on, the right of way through the defendant's land, but were taken to, and used to, improve the roadway through other lands. The only possible service it could be to the plaintiff through the defendant's lands was to so destroy the defendant's gravel bank as to allow the plaintiff to remove its track further eastward without being compelled to build the stone wall or other protections

provided for in its original grant. So far as the Wharton line is concerned, the plaintiff already has a good and sufficient grant, in its title bond, which was duly acknowledged and recorded. The granting part thereof is in these words: "The said William Johnson, Jr., does hereby grant and convey unto the said Wheeling, Parkersburg & Charleston Railway Company [plaintiff by former name] the full and free right of way, of the width of fifty feet, with necessary ground for cuts and fills for the road of said company, in, upon, and through the lands of the said William Johnson, Jr., and described substantially as follows, to wit: Being a line of said road as surveyed by Engineer Wharton. But it is understood and agreed that the said railroad company must either build said roadbed far enough from the gravel bank and underneath which the line runs so as to keep said bank from washing, or shall protect said bank by a wall, or in some way shall prevent washings [the plaintiff did so by removing the bank to some other location], which right of way is hereby granted and conveyed for the construction, building, and use of the road of said company." Under this title bond the plaintiff already has a good title for the 50 feet of land of which the Wharton line is the center, and, if its road is located on this line, it needs no better title. This suit for a deed is only a pretext to transfer the controversy between the parties from a court of law into a court of equity. The defendant admits the company's right to continue its road on the present location by reason of adverse holding for 10 years, and his acquiescence therein, but denies its right to 25 feet east of such holding, or any land beyond what it has in actual and exclusive possession. Continuous adverse possession of a greater quantity of land than originally conveyed is confined to, and extends no further than, the land thus occupied. *Corning v. Gould*, 16 Wend. 531; *Railroad Co. v. Houghton* (Ill.) 1 L. R. A. 213, note (s. c. 18 N. E. 301, 9 Am. St. Rep. 581).

The plaintiff and defendant, through their attorneys, entered into a stipulation in the circuit court that if this cause resulted in favor of the defendant the court was to ascertain the amount of sand and gravel removed by the plaintiff since the former recovery, and the value thereof at five cents per cubic yard, and judgment was to be entered therefor in the suit at law. The defendant insists that this court should make such ascertainment, and enter a decree for the same. There is no prayer for affirmative relief in the defendant's answers, and this court is without jurisdiction to enter such decree, but must leave the matter of enforcing the stipulation with the circuit court.

The decree of the circuit court is reversed, and the bills are dismissed.

ATCHISON, T. & S. F. RY. CO. v. GENERAL ELECTRIC RY. CO.*(Circuit Court of Appeals, Seventh Circuit, January 7, 1902.)*

[112 Fed. Rep. 689.]

Street Railroads—Use of Streets—Injunction.*

Under the rules of decision in Illinois, authority given a steam railroad by a city to cross a street with its tracks confers no exclusive rights in such street, but the right granted is subordinate to the use of the street for ordinary street purposes, which include the operating of a street railroad thereon; and the railroad company is not entitled to damages because of the construction of a street railway along such street, on the ground of delay to its trains, and increased danger at the crossing, nor can it maintain a suit in equity for an injunction against such use.

Same—Alleged Invalidity of Ordinance—Attack by Private Suitor.

Under the settled rule of decision in Illinois, a railroad company, which has constructed its tracks across a street under authority from the city, has no standing in equity to attack the validity of an ordinance granting a franchise for a street railroad along such street, either on the ground of fraud or for want of power in the city council to pass it.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The Atchison, Topeka & Santa Fe Railway Company, complainant below, appeals from a decree of the circuit court sustaining demurrer to its amended bill for want of equity, and thereupon dismissing the bill, which is filed to enjoin the construction and operation by the appellee, the General Electric Railway Company, of a proposed street railroad in Dearborn street, in the city of Chicago, "over, across, or in the vicinity of the tracks" used by the appellant "in said street," held under leases from the company owning the terminals in Chicago. The appellant's allegations of interest in the subject-matter are thus summarized in the brief filed on its behalf: "That on or about August 1, 1887, there was duly passed by the city council of Chicago and became effective an ordinance entitled 'An ordinance granting permission and authority to the Atchison, Topeka & Santa Fe Railroad Company in Chicago to construct, maintain and operate a railroad,' wherein and whereby permission and authority were given and granted to said Atchison, Topeka & Santa Fe Railroad Company in Chicago, a corporation of this state, its lessees and successors, to construct, maintain, and operate a railroad, with one or more railroad tracks, with the necessary and convenient side tracks, turnouts, switches, and appurtenances, along certain lines and routes in said ordinance designated, and including the tracks afterwards laid across Dearborn street; that under this ordinance the Atchison, Topeka & Santa Fe Railroad Company in Chicago constructed its tracks in said city, including its main freight track, across Dearborn street, in the vicinity of Fifteenth street, together with a large

*See generally, 7 Rap. & Mack's Dig. 369 et seq.

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number of side tracks connecting therewith on either side thereof, on lands owned by it, and leading to the freight house and freight yards located near and upon State street, and connecting the same with what is known as the 'Eighteenth Street Yards,' in said city; that the appellant is the lessee for a long term of years of the railroad and property of the Atchison, Topeka & Santa Fe Railroad Company in Chicago, including the above tracks, and the same are used as the terminals in this city of the appellant, and appellant is also possessed under certain contracts and leases for a long term of years of the right to occupy, use, and enjoy a certain other track or side track adjacent to said main freight track in Dearborn street, and connecting with its other tracks, side tracks, and switches extending to its freight depot and yards near and on State street; that it carries to its said freight yards a vast amount of freight traffic, and in the movement of freight cars, loaded and empty, between said yards and for transportation over its lines, it has in the past required, and will in the future require, almost constant use of said main freight track and side track adjacent thereto across Dearborn street; that owing to the grade of its tracks on either side of Dearborn street, and the depression of the same to the west thereof, required to be made by ordinance of the city in respect to track elevation, a certain momentum must be given to cars and trains to move the same across said street, and, on account of the depression and a subway on the west side of Dearborn street required by said track elevation ordinance and retaining walls rendered necessary thereby, the view from engines thereon to trolley cars in the street, and from trolley cars to engines and cars approaching from the west, is so greatly obstructed as to render the crossing of such trolley cars and engines exceedingly dangerous, and collisions are liable to frequently occur, even with the use of the greatest care, and lives of employees and passengers jeopardized; that on the east side of Dearborn street, south of the main freight track, are several large buildings which obstruct the view of an approaching trolley car, and impede and render more dangerous the movement of cars over said Dearborn street from tracks east thereof; that a vast amount of tonnage of freight must necessarily be moved over said terminals to and between said freight yards, and from its main line to the freight depot, in order to accommodate shippers in the said city of Chicago, and that heretofore it has enjoyed the use of said tracks across Dearborn street without unlawful interruption or obstruction thereof, and it is entitled to continue the use without unlawful interruption or obstruction; that the tracks and terminals in the vicinity of Dearborn street connect with the tracks and terminals of a number of other railroads terminating in the city, forming a great terminal system, and requiring the interchange of freight traffic between said companies." The bill further alleges the incorporation of the appellee for the pur-

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pose of constructing and operating street railways in the city of Chicago, but that it is invested with no power or capacity to carry out such purpose; that it proceeded "fraudulently, corruptly, and in threatened willful violation of the rights of the complainant, and in disregard of the requirements of the statutes," and procured the passage by the city council of Chicago of a "pretended and void ordinance," on January 13, 1896, which purported to authorize the construction and operation of a street railway upon certain streets of the city, including Dearborn street at the place of the appellant's crossing thereof; that the petition upon which such ordinance was procured had no assent of the owners of one-half of the lot frontage on said Dearborn street, as required by statute, and was without the assent of the appellant or its lessor; that the railroad properties fronting thereon were excluded from computation in that behalf; and that signatures which were presented were in some instances forged, and in others unauthorized or withdrawn, so that the ordinance was unauthorized, and "in direct violation of the statute." The intention and preparations of the appellee to construct such railway upon Dearborn street and at grade across the tracks of the appellant are further alleged, and that such construction and crossing "will constitute a death trap, be full of constant danger to trainmen and the public traveling on said electric car line at that point," and will constantly impede appellant "in the movement and transaction of its freight business, and render its freight house and freight yards, team tracks and railroad tracks, in the vicinity thereof, to a large extent useless," and the obstruction and interruption of its use of the tracks on Dearborn street by street cars over this crossing "would in a large measure destroy" such use, and "greatly endanger the operation of engines and cars over the same"; that other and sufficient street car lines exist in the immediate vicinity, and there is no public necessity or demand for the construction or use thus proposed; and that the proposed construction and use "will cause great and incalculable damage" to the appellant.

Robert Dunlap, for appellant.

Edwin Walker and Thomas A. Moran, for appellee.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The appellant has a great railway system extending between Chicago and the Pacific Coast, with valuable terminals in Chicago held under leases, but its right to maintain this bill must be tested by its property interests in the crossing at Dearborn street, and not by the mere vicinity of its important interests and connecting tracks. The case presented differs materially from that in which an injunction in favor of

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abutting property owners was sustained by this court in *General Electric R. Co. v. Chicago, I. & L. Ry. Co.*, 39 C. C. A. 345, 98 Fed. 907, recently affirmed on rehearing by a majority opinion (46 C. C. A. 629, 107 Fed. 771), as the only question which was there involved or decided was the right of an abutting property owner to relief in equity for irreparable injury to such property by the proposed railway construction in the street, which would deprive the owner of reasonable access to his property, and the remarks in the opinion in reference to *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265, *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588, 56 N. E. 963, and other Illinois cases, are not applicable to the case at bar. That decision well recognizes that the abutting owner is vested with an appurtenant interest in the street which gives access to his property, though not owning the fee in the street, and that such interest is threatened with an actionable injury; and thereupon rules that the allegations in the bill of irreparable injury are sufficient to distinguish the case from those cited, and that, at the utmost, if the decisions in Illinois, "conceding the full right" to damages, "mean that the appropriate and only remedy is such as the courts of law can give, they are not binding," as "the federal courts decide for themselves whether for an actual or threatened invasion of a conceded or asserted right equity may afford relief." On the other hand, this appellant has no such interest in the portion of the street in controversy as was involved in that case, and no property right in easement or fee which is independent of the rights of the general public therein, unless its permit from the municipality to cross Dearborn street with its tracks for the purposes of railway passage and traffic confers an interest within the rule there upheld, and it is elementary that the extent of the interest thus acquired in street and crossing is governed by the *lex rei sitæ*.

The doctrine is firmly established in the state of Illinois, in accordance with the general weight of authority, that by the construction and use of street railway tracks no additional burden is imposed upon the easement, as such use "falls within the purposes for which streets are dedicated or acquired" (2 Dill. Mun. Corp. [4th Ed.] § 722); but that the use for steam railway purposes is beyond the general public easement, and imposes an additional servitude (*Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 267, 273, 40 N. E. 1008, 29 L. R. A. 485, and cases cited; *Bond v. Pennsylvania Co.*, 171 Ill. 508, 513, 49 N. E. 545; *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588, 56 N. E. 963). It is equally well settled by the uniform line of decisions in the same state that the use of a street by a steam railway is legitimate when duly authorized, but that no exclusive use is conferred by the permit, and it can "only be enjoyed in common with the use of the avenue by the public as an ordinary high-

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way, and without materially impairing its usefulness as such." *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157, 173; *Ligare v. City of Chicago*, 139 Ill. 46, 62, 28 N. E. 934, 32 Am. St. Rep. 179; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 265, 267, 273, 40 N. E. 1008, 29 L. R. A. 485; *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, 296, 54 N. E. 825, 53 L. R. A. 223; *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588, 56 N. E. 963. With the rights of the appellant in this street crossing thus defined, they are in subordination to the use for street purposes, which includes use for a street railway. The right is held in common, is "joint and mutual, not exclusive" (*Reich's Case*, 101 Ill. 157, 175); and the primary object of the street is for ordinary passage and travel, of which the public and individuals cannot rightfully be deprived (*Ligare's Case*, 139 Ill. 46, 62, 28 N. E. 934, 32 Am. St. Rep. 179; *General Electric Ry.'s Case*, 184 Ill. 588, 595, 56 N. E. 963). The bill alleges as the substantial injury which the appellant will suffer by the proposed crossing of its tracks by the street railway that it will cause delay and greatly increase the danger of operating its engines and trains over the crossing. Threatened injury to its tracks in making such crossing is also averred in general terms, but no facts are stated from which the injury referred to can be deemed irreparable, or of such character that equitable relief could rest thereon. The proposed use of the street, however, for a street railway is within the public purposes of the street, and, as held by the authorities cited *supra*, imposes only the burden to which the steam railway crossing was subjected by the permit. For such crossing of the steam railway tracks at grade by a street railway "damages are not allowable for increased delay or danger in crossing" (*Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 267, 40 N. E. 1008, 29 L. R. A. 485), and it is plain that a bill cannot be maintained on behalf of the appellant to enjoin the construction and use to that end, unless the fact of construction without due authority,—namely, through the alleged invalidity of the ordinance purporting to grant the use of the street to the street railway company,—can be invoked for that purpose and thus constitute a cause of action. It is alleged that the ordinance is void for fraud in its procurement and for want of the requisite petitioners to authorize its adoption, and, if the appellant has no standing in equity to raise that objection, it is unnecessary to pursue the inquiry further. Upon the contention thus narrowed, the adjudications in Illinois are in point and conclusive (as held by this court in *Blodgett v. Railroad Co.*, 26 C. C. A. 21, 80 Fed. 601, and *Coffeen v. Railway Co.*, 28 C. C. A. 274, 84 Fed. 46) that the question whether the ordinance was either fraudulently obtained or invalid cannot be raised by the appellant. *Patterson's Case*, 75 Ill. 588; *Doane's Case*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; *General Electric Ry.'s Case*,

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184 Ill. 588, 56 N. E. 963. Indeed, the brief submitted on behalf of the appellant concedes this view, in so far as the allegations relate to fraud in procuring the ordinance, remarking that "in such case action would have to be taken in the name of the city or by the public prosecutor," and relief is claimed solely on the ground that the ordinance "is absolutely void, because, under the circumstances stated in the bill, the city council has no power to grant to the appellee the right to lay down its railroad tracks." This distinction, however, is without force, under the authority of both the Doane Case and the General Electric Ry. Case, *supra*. In the former the bill for an injunction alleged the invalidity of the ordinance upon the same grounds asserted here, and the opinion, dismissing the bill for want of equity, thus answers the like contention thereupon:

"But it is insisted on behalf of the complainant that on the facts set up in his bill the ordinance must be treated as passed without the required consent of abutting owners, and therefore illegal and void, which being true, the defendant should be held as proceeding with the work without any authority of law whatever, whereas in the cases referred to lawful consent of the city was shown. The real ground upon which relief by injunction is denied in such case is that the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for any injury resulting to his property. He has no standing in equity on account of public injury or for the purpose of inflicting punishment upon the defendant for its wrongful acts."

Again, in the recent case of General Electric Ry., *supra*, the supreme court applied this rule in respect of like allegations of invalidity touching the identical ordinance involved in the present action, and in reference to a railroad crossing at Fourteenth street, over which the same street railway was in course of construction.

With the right and interest of the appellant thus distinguished, so that the rule held by this court in General Electric R. Co. v. Chicago, I. & L. Ry. Co., 39 C. C. A. 345, 98 Fed. 907, and 46 C. C. A. 629, 107 Fed. 771, is not applicable, we are of opinion that the decree below is in accord with the well-established doctrine in Illinois, and the decisions of this court thereupon (*Blodgett v. Railroad Co.*, 26 C. C. A. 21, 80 Fed. 601; *Coffeen v. Railway Co.*, 28 C. C. A. 274, 84 Fed. 46), and with like rulings in *Chicago & C. Terminal Ry. Co. v. Whiting. H. & E. C. St. Ry. Co.*, 139 Ind. 297, 304, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264, and *Market St. Ry. Co. v. Central Ry. Co.*, 51 Cal. 583.

The decree is accordingly affirmed.

FRESNO ST. R. CO. v. SOUTHERN PAC. R. CO. et al.*(Supreme Court of California, Dec. 26, 1901.)*

[67 Pac. Rep. 773.]

Street Railways—Interference with Franchise—Ejectment Not the Proper Remedy.*

Where a street railway's use of a street under its franchise is interfered with by another railway company, ejectment is not the proper remedy.

Same—Encroachment on Right to Use Street—Acquiescence.

Where, when a railroad track was laid so as to encroach on the rights of a street railway company to the use of a street under its franchise, the president of the latter company desisted from a contemplated injunction at the request of the president of the former, and on promise of payment of all resulting damages, such street railway company or its assigns cannot thereafter maintain ejectment to remove such railroad from such street.

Same—Same—Bound by Knowledge of Officers.

Where the rights of a street railway company in the use of a street are encroached on by a railroad with full knowledge and acquiescence of the president and other officers of the street railway company, and on promise of payment of all damages, the company is bound by such knowledge and acts of its officers.

Department 1. Appeal from superior court, Fresno county; E. W. Rising, Judge.

Action by the Fresno Street Railroad Company against the Southern Pacific Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

L. L. Cory and Foshay Walker, for appellants.

Frank Short, for respondent.

VAN DYKE, J. This is an action of ejectment brought to recover a portion of the right of way claimed by the plaintiff, lying upon Tulare avenue, a highway in Fresno county. Verdict and judgment went for the plaintiff in the court below, and this appeal is from the judgment, and from an order denying defendants' motion for a new trial. The appellants make two points on the appeal: First, that the action of ejectment is not maintainable for the sort of injury here involved; secondly, that the action of ejectment could not be maintained in this case because of the consent or acquiescence of respondent in the construction of the San Joaquin Valley Road, the predecessor in interest of defendants and appellants, over a portion of the right of way in question.

It is not questioned on the part of the appellants that there is a class of cases wherein an action will lie for the recovery of a right of way, but it is claimed that in all such cases there is an exclusive right of possession in the body politic, corporation, or person seeking to enforce such a remedy, as, for instance, a city or other municipal body may maintain eject-

*See generally, 7 Rap. & Mack's Dig. 713 et seq.

ment for the recovery of a street or park; and a county, to recover a public road or highway. Such were the cases of *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303, and *City and County of San Francisco v. Grote*, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155. It has also been held that ejectment would lie to recover possession of the right of way, or any portion thereof, granted by congress to the Central Pacific Railroad Company. See *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, and *Same v. Hyatt*, 132 Cal. 240, 64 Pac. 272. The streets and parks in such cases belong to the public, and the public is entitled to the exclusive possession and use of the same; and the municipality or county, as the case may be, is simply the agent of the public, and hence is entitled to bring an action to recover possession in case the public has been ousted of the same. So in reference to the congressional grant of right of way to the Pacific Railroad Company, the grant in that case conveys exclusive right of possession to all within the boundaries of the grant, for the purposes of constructing and operating the railroad in question. In this case, however, it appears by the admitted facts that the plaintiff's right is based upon a franchise granted by the board of supervisors of the county of Fresno to operate and maintain a railroad along and over Tulare avenue, and that said avenue is a public highway in the county of Fresno. In *City and County of San Francisco v. Grote*, supra, the court says: "It may be conceded that a naked right of way, an easement in its simplest form, a mere right to pass over the lands of another, is a thing so intangible and unsubstantial as to be insufficient to support an action of ejectment. But here the right of the city goes far beyond that. The city has the right of the exclusive possession, a right to disturb the soil, a right to grade and otherwise improve the street in many ways. In other words, more than a mere right to the use of a street passes to the public by dedication. In addition to the right of the use there passes such an interest in the land as is necessary for the enjoyment of that use by the public." And in *Wood v. Turnpike Co.*, 24 Cal. 474, the court says: "But it is well settled that an action of ejectment will not lie in favor of a party to try his right to enjoy an easement, nor will it lie against one claiming an easement in land to try his right to enjoy it. And the reason is obvious. The very subject-matter of controversy is incorporeal. It is for that reason that an easement 'lyeth in grant, and not in livery.' It is for that reason that the owner of a way cannot be disseised or otherwise ousted of it. He can only be 'disturbed' or 'obstructed' in its enjoyment, and for such injury the remedy is by action on the case at common law, or by bill in equity,"—citing a long list of authorities. In *City of Racine v. Crotsenberg*, 61 Wis. 481, 21 N. W. 520, 50 Am. Rep. 149, it is said: "No one will contend that an action of ejectment will lie to recover a simple right

of way. Such an easement is incorporeal in its nature, and ejectment lies only to recover things corporeal which may be the subjects of seisin, entry, and possession. There can be no seisin of an incorporeal hereditament, and it cannot be the subject of entry or possession. It 'lyeth in grant, and not in livery.' " The same rule was held in *Fritsche v. Fritsche*, 77 Wis. 270, 45 N. W. 1089, where it is said: "It is well settled, both on principle and by authority, that the action cannot be maintained for such purpose." That was ejectment, also, to recover a private right of way claimed by the plaintiff as against the defendant, who had obstructed the same at some point. The right to a fee and the right to an easement in the same estate are rights independent of each other, and may subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right. The owner of the fee is the one entitled to the exclusive possession, and may protect and enforce his right by ejectment, but, for the disturbance or obstruction of an easement or franchise, ejectment is not the proper remedy. In addition to the cases quoted, see, further, *Child v. Chappell*, 9 N. Y. 246; *Washb. Easm.* 568; *Taylor v. Gladwin*, 40 Mich. 232; *Smith v. Wiggin*, 48 N. H. 105; 2 *Bac. Abr.* 417; *Adams, Ej.* 16; *Runn. Ej.* 25.

The evidence shows such an acquiescence or consent in the use of the right of way by the San Joaquin Valley Railroad Company, predecessor in interest of the defendants, as would defeat a recovery in this action, even if ejectment were the proper remedy. In the evidence produced on behalf of the respondent the following occurs in the testimony of Mr. J. R. White, president of said company: "I did not bring any suit at that time to enjoin them from doing it. They said, if I would not enjoin them,—put them to any trouble,—that they would pay for all the damages. Q. Yes; that is the arrangement you made, wasn't it? You stated there that they said, if you would let them go on and build their road without interference or interruption, that afterwards they would pay for whatever damages you suffered? A. I had no power to let them go on. Q. I am not talking about the power, but that is the arrangement you made with the president of the road,—with Mr. Pollasky? A. Well, I didn't stop them. I didn't stop them any further. Q. Just answer the question, if that is not so? A. What arrangement? What do you have reference to? Q. That you, as president of the road or the company, would not prevent them from laying their rails upon your roadbed, and interfere with the progress of the road; and Mr. Pollasky, he was president of the San Joaquin Valley Railroad? A. Yes. Q. He agreed that if you would not prevent them, or the company would not prevent them, that he would see you were paid whatever damages the company suffered by the use of that road there? A. Well, I didn't make any such agreement with him, because I had not power to

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make them. Q. What did you say to him, then? A. I think the matter kind of dropped there; that I didn't make no arrangements, because I had no power, but might have said that we would call the company together,—something of that kind. I can't tell just what the conversation was. It was a long time ago. Q. And the result of it all was that you and Mr. Pollasky—he as president of his road, and you as president of your road—talked about this matter? A. Yes; there was talk about it. Q. And he didn't want the road stopped at that time by any suit for an injunction? A. No. Q. That was it? A. That was what he wanted. Q. And he said that, if the San Joaquin Valley Railroad Company was allowed to lay its rails on your roadbed for that quarter of a mile, that his company would afterwards pay damages,—whatever damages the company suffered? A. Well, he spoke something about making it all right, or something of that kind; that he would see. Q. Well, you relied upon that, and didn't do anything further? A. Well, we supposed they would do something. Q. Yes; and you didn't take any other steps in the matter? A. No. Q. And let the work progress? A. We supposed it would be satisfactory. That is all I have to say about it." The vice president of respondent, F. G. Berry, testified: "I had no more charge of the road than did Mr. White. At the time the Pollasky road, so called, was built, I was a director of that company. I was not in Fresno when the graders took possession of this portion of the road. I remember about that time I came to Fresno while they were having a controversy over taking possession. It might possibly have been the next day. Mr. White stopped their working. I came to Fresno before the road had been completed over this quarter of a mile, and saw Mr. Pollasky, the president of the road, with reference to it, and he and I had a conversation with reference to the right of the Pollasky road to occupy this roadbed and take up the rails. I could not state positively the substance of the conversation. I think he said that Mr. White had been down there, and had either served, or was about to serve, an injunction. He said: 'Now, here, stop that. It will be all right.' We were all very anxious to get that through to the timber, that was where it was supposed to go; and I think in general conversation I said to Mr. White, if they will put that down and replace it, and allow us something for it, in God's name let it go,—something to that effect; and that is the way it went; and I think they agreed to do that with Mr. White. I know nothing, however, about the matter myself, as to what they agreed with Mr. White. It was generally supposed that they were to take this up and replace it, and pay us for all damages. I do not know a thing in the world about that myself. At any rate, after our conversation—Mr. White's conversation with Mr. Pollasky—there were no further objections to the use of that roadbed at that time, and we allowed them to go on and complete their

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road over this roadbed, and take up the rails; and they went ahead and built the road on to Pollasky, about twenty-three miles from there,—a broad-gauge, standard railroad,—and they used and operated it as a broad-gauge, standard railroad from that time to the present. * * * This roadbed of ours out there was constructed upon a public highway,—Tulare avenue. The Fresno Street Railroad Company operated its road under its franchise from the county.”

The owner in fee, even, cannot permit a railroad company to construct and operate its road through his land upon an understanding that compensation shall thereafter be made for the right of way, and then maintain ejectment if the damages be not made as per agreement. His remedy in such case is an action to recover the compensation. After the interview between the president of the San Joaquin Valley Railroad Company and the president and vice president of the respondent, Fresno Street Railroad Company, as detailed by respondent's witnesses, the San Joaquin Valley Railroad Company went on with its work, and built and operated some 20 miles of railroad, without any further opposition or interference on the part of the respondent. A failure to bring an action, where the right exists, until after public interests have intervened, will prevent its successful prosecution. Acquiescence for a considerable period after the railroad company has entered upon its duties will defeat the action to recover possession. In *Mitchell v. Railroad Co.*, 41 La. Ann. 363, 6 South. 522, the court says: “Surely the defendant's act in openly entering upon plaintiff's land with plaintiff's knowledge, and in full view of his domicile, and constructing thereon a most important link in their transcontinental railway, could not subject it to such consequences. But this is not an open question, however, as it has been by us twice considered and decided adversely to plaintiff's contention, and in cases cited in plaintiff's brief. In *Bourdier v. Railroad Co.*, 35 La. Ann. 949, it is said: ‘If the entry was unlawful, the plaintiffs condoned it. They should, at once, and peremptorily, have forbidden the entry of the defendant, if they intended to dispute its right to the roadbed, etc. * * * They should have denied defendant access, and have prevented it by using legal process.’” In *St. Julien v. Railroad Co.*, 35 La. Ann. 924, the matter is fully discussed, and the doctrine referred to is approved, to wit: “The landowner may, even by parol, waive the right to prepayment as a condition precedent to an entry for construction; but, having waived it, he cannot treat the company's possession as unlawful.” To the same effect was *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Railroad Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Pryzbylowicz v. Railroad Co.* (C. C.) 17 Fed. 492.

But it is contended that respondent is not bound by the acts of its president and other officers in this matter. The company, under the circumstances, however, must have

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known what was going on in a matter affecting its interests, and the law will presume it did know what its president and vice president knew. Being thus fully advised in the premises, it permitted the San Joaquin Valley Railroad Company to go on with its work and construct its road, and, as already stated, allowed it and appellants, its successors in interest, to operate the same for about four years unmolested. In such case a corporation is bound in like manner as an individual would be bound. As said in *Balfour v. Irrigation Co.*, 123 Cal. 396, 55 Pac. 1063: "It must be presumed that the corporation had full knowledge of all the facts which were known to its president. The president of a corporation is the proper person to whom notice which is to affect a corporation is to be given. The corporation has no eyes, ears, or understanding, save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption. *Thomp. Corp.* § 5288. Appellant's counsel seems to appreciate the force of this rule, but contends that it ought not to be applied in this case. 'It would destroy all safeguards and all protection to corporate property,—at least, to the extent wherein the power of making, authorizing, or ratifying contracts is reserved to the board of directors.' Corporate property is no more sacred than any other property, and corporations can only be reached through their agents. It behooves them to be especially careful in regard to the conduct of their agents. In no other way can knowledge be conveyed to the fictitious entity, or negotiations be had with it. It is not usual for parties dealing with a corporation to be brought before the directors to negotiate their contracts. Instead of seeing any reason for excepting this case from the rule, it seems to be exactly the case in which justice requires its application." The observation of the court in that opinion applies with equal force here.

Judgment and order reversed, and cause remanded.

We concur: GAROUTTE, J.; HARRISON, J.

BRASINGTON v. SOUTH BOUND R. CO.

(*Supreme Court of South Carolina, Jan. 20, 1902.*)

[49 S. E. Rep. 665.]

Violation of Ordinances as Negligence.*

In an action against a railroad company for negligence an ordinance which it had violated is admissible in evidence, though not pleaded.

Same—Punitive Damages.

Where a complaint charges that a railroad company wantonly, carelessly, recklessly, and negligently omitted to comply with a municipal

*See generally, 7 Rap. & Mack's Dig. 697.

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ordinance, it states facts upon which punitive damages may be awarded.

Liability for Leaving Unguarded Excavation in Highway—Instructions.

An instruction that a person making an excavation in a highway, and carelessly and negligently failing to provide proper safeguards, is liable to any person injured by reason thereof, is not erroneous, and, if defendant desired instructions as to any limitations of such doctrine, he should submit a request therefor.

Instructions.

Where an objection to the introduction of an ordinance in evidence was that it was not pleaded, an instruction that the city council had the power to pass the ordinance, and that it is binding on the defendant, without leaving to the jury the question of the proper promulgation of the ordinance, is not a charge on the facts.

Punitive Damages.

Where the evidence shows that negligent acts complained of were committed in gross negligence or recklessness or wanton disregard of the rights of others, punitive damages may be awarded.

Personal Injuries—Elements of Damages.

An instruction that the jury could give the injured party compensation for pain suffered in the past, and such as, in the ordinary course of nature, he would suffer in the future, and for such expenditures as he had sustained up to the time of the trial, but not such as he would be required to make in the future, was not erroneous.

Appeal from common pleas circuit court of Richland county; Townsend, Judge.

Action by James L. Brasington against the South Bound Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. H. Lyles, for appellant.

John P. Thomas, Jr., and M. L. Smith, for appellee.

GARY, J. The above-entitled action was commenced on the 15th of March, 1900, for the recovery of damages for injuries alleged to have been sustained by the plaintiff by falling into a cut excavated by the defendant in building its line of railway through the city of Columbia at the point where said line crosses Laurel street. The specifications of negligence are thus alleged in the complaint: "That the defendant did carelessly, wantonly, recklessly, and negligently, and in disregard of the provisions of said ordinance and of the duty which it owed to passengers on said streets and sidewalks, permit said excavation or cut in and across Laurel street to remain unguarded, and without any fence, railing, guards, or other structures to prevent accidents at the sides of said excavation or cut; and wantonly, recklessly, carelessly, and negligently omitted to fix and keep any lights near said excavation or cut, and in like manner omitted to erect any bridge or other crossing on said street and on the sidewalks thereof; and wantonly, carelessly, recklessly, and negligently made said excavation or cut more than twenty feet below the grade of said Laurel street at the crossing and more than twenty-five feet across the top, in open and direct violation of the plain provisions of said ordinance and in disregard

of the express conditions upon which said company was authorized to occupy and use the said street and make excavations and cuts therein." The jury rendered a verdict in favor of the plaintiff for \$3,000.

The defendant appealed upon exceptions, the first of which is as follows: "(1) Because, against the objection of the defendant, his honor the presiding judge allowed the plaintiff to introduce section 101 of the Revised Ordinances of the City of Columbia, reading as follows, to wit: 'Excavations in any street or alley shall be securely covered at all times when persons are not at work therein; and such excavations, when made for the purpose of laying gas or water pipes, shall have the earth new rammed when closing the same, and the street left in as good condition as before said excavations, under penalty of five dollars, to be collected from the party ordering the excavation to be made,'—when said ordinance had not been pleaded, and the same was irrelevant and incompetent, and tended to establish a breach of duty on the part of the defendant which had not been alleged in the complaint." It is true, Mr. Chief Justice McIver, in *City Council of Charleston v. Ashley Phosphate Co.*, 34 S. C. 550, 551, 13 S. E. 846, says: "It is true that the complaint does contain an allegation that 'the plaintiffs, on the 27th day of December, 1888, for the purpose of raising a revenue, and in exercise of the taxing power, passed an ordinance entitled 'An ordinance to regulate licenses for the year 1889,' whereby, inter alia, it is provided that phosphate rock mining or manufacturing companies or agencies engaged or intending to engage in business in said city shall, on or before the 20th day of January, A. D. 1889, obtain each a license therefor, and shall be required each to pay for the same the sum of \$500.' But there is no allegation that such ordinance, thus referred to by date and title, contained any provision authorizing the enforcement of the payment of such license fee by suit or otherwise, as the act above referred to authorized; nor is there any allegation that such ordinance contained no provision at all for the enforcement of such payment. The reference to this ordinance by date and title is not sufficient, for, as is said in 1 Dill. Mun. Corp. (4th Ed.) § 346: 'The courts, unless it be the courts of the municipality, do not judicially notice the ordinances of a municipal corporation, unless directed by charter or statute to do so. Therefore such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out in the pleading. It is not sufficient that they be referred to generally by their title or section,'—though probably they need not be set out in *hæc verba*, a statement of the substance with reference to the date, title, and section being sufficient. See, also, *In re Oliver*, 21 S. C. 323, 53 Am. Rep. 681. Here, however, there is no allegation that the ordinance in substance provides for the enforcement of the payment of the license fee by action. It seems to us,

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therefore, that the allegations in this complaint are not sufficient to constitute the cause of action sought to be enforced therein, but that a 'further allegation was necessary for that purpose, either to the effect that provision had been made in the ordinance, as authorized by the act of 1881, supra, for the enforcement of the payment of such license tax by action, or that no provision whatever had been made for that purpose, which would have raised the question whether, in the absence of any provision at all, the court of common pleas, by virtue of its general jurisdiction, could enforce a right conferred by an ordinance of a municipal corporation by an ordinary action, where no other mode of doing so has been provided by the ordinance.' But in that case the ordinance was the foundation of the plaintiff's cause of action, and the rule there stated does not apply in other cases. In *Nohrden v. Railroad Co.*, 54 S. C. 496, 32 S. E. 525, Mr. Chief Justice McIver points out this distinction when he says: "The second ground upon which this motion is based, or, rather, the second defect in the statements of the complaint relied on to support the motion,—the failure to state in paragraph 2 of the third cause of action certain facts,—cannot be sustained. The defect relied on is the failure to state 'the title, date, and authority for passage and publication of the alleged Revised Ordinances of the city of Charleston, and the substance of the alleged section 605 thereof, and the same with regard to the alleged amendment thereto referred to, in said paragraph. This is not an action to enforce the performance of any duty imposed by an ordinance of the city of Charleston, or to enforce the payment of any tax or penalty imposed by such ordinance, but the cause of action here is the negligence of the defendant company, resulting in the death of the intestate, and the ordinances of the city are only referred to as showing such negligence. The case of *City Council of Charleston v. Ashley Phosphate Co.*, 34 S. C. 541, 13 S. E. 845, relied on by counsel for appellant, does not, therefore, apply to this case." If the rule laid down in the case of *City Council of Charleston v. Ashley Phosphate Co.* had been applied in the case of *Nohrden v. Railroad Co.*, the objection to the ordinance would have been sustained. In 15 Enc. Pl. & Prac. 427, under the head of "Violation of Ordinances Relied on as Negligence," it is said: "It is, of course, unnecessary to plead the ordinance when the action is not founded upon it; but, nevertheless, in such cases it is, in some jurisdictions, admitted in evidence on the question of negligence." This exception is overruled.

The second exception is as follows: "(2) Because, against the objection of the defendant, the plaintiff was allowed to introduce in evidence section 347 of the Revised Ordinances of the City of Columbia, as follows, to wit: 'In order to provide for the safety of the public at places where the tracks of the steam railroad companies cross the streets of the city of Columbia, it shall be the duty of said companies to station

during the daytime at such crossings as in the judgment of the city council the public safety may require, to be designated by city council, a flagman, whose duty it shall be to show a red flag whenever a train may be approaching or crossing such streets; and it shall also be the duty of said companies to provide and maintain at such crossings a good and sufficient light, to burn from thirty minutes after sunset until one hour before sunrise,'—when it had not been pleaded; and was irrelevant and incompetent, and tended to establish a breach of duty on the part of the defendant which had not been alleged in the complaint." This is disposed of by what has just been said, and is overruled.

The third exception is as follows: "(3) Because his honor charged the jury as follows, to wit: 'The complaint in this case has that form,—it is for punitive damages,—it is drawn in that form. * * * The damage it sets forth in a manner which would call for punitive damages, provided all the facts (material facts) are proven to the satisfaction of the jury,'—thereby indicating—First, that, although the complaint contained no allegation of willful or intentional injury on the part of the defendant, it nevertheless alleged the damage in a manner 'which would call for punitive damages'; and, second, thereby indicating that, if the facts alleged in the complaint were proven to the satisfaction of the jury, it would be their duty to give punitive damages.'" In *Watts v. Railroad Co.*, 60 S. C. 74, 38 S. E. 242, Mr. Justice Jones says: "In the fourth paragraph it is alleged that the plaintiff fell into said cut and was injured 'by reason of the wanton and reckless carelessness and negligence of the defendant in not properly guarding and protecting said excavation,' etc. These allegations, we think, are sufficient to warrant the charge in reference to exemplary damages. In the *Century Dictionary and Encyclopedia* 'wanton' is defined as follows: '(2) Characterized by extreme recklessness, foolhardiness, or heartlessness; malicious; recklessly disregarding of the right or of consequence.' A charge that an act was recklessly and wantonly done or omitted indicates much more than mere inadvertence and implies that the wrongdoer has a mind or spirit which, though adverting to its duty and the consequences of its breach, yet in unbridled license disregards the same. The language imports a conscious failure to observe due care from which evil intent may be inferred. See *Mack v. Railroad Co.*, 52 S. C. 344, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Glover v. Railway Co.*, 57 S. C. 228, 35 S. E. 510." This authority, as well as others which could be cited, disposes of both the subdivisions in said exception.

The fourth exception is as follows: "(4) Because his honor charged, with reference to the defendant's franchises, as follows, to wit: 'But it must observe the regulations of the city also, because the city is chartered by the legislature. The city has certain rights granted to it by its charter, and these

rights and charters to the city of Columbia give the right to make certain regulations,'—thereby indicating it was the duty of the defendant to observe the provisions of the ordinances of the city which had been introduced in evidence by the plaintiff, although not pleaded in the complaint, and although no breach of such ordinances was alleged in the complaint." This exception is disposed of by what has already been said, and is overruled.

The fifth exception is as follows: "(5) Because his honor charged the jury, with reference to defendant's third request to charge, as follows, to wit: 'I charge you that, with this: That if that includes the observance of the reasonable ordinances of the city, which have been properly promulgated, then I charge you it is. It is necessary for them to take all reasonable care under the common law, and it is necessary to observe an ordinance, if such ordinance of the city has been properly promulgated,'—thereby indicating that the jury could take into consideration the breach of the provisions of any ordinance of the city which had been properly promulgated, although such ordinance was not alleged in the complaint, and no breach of its provisions was alleged." This is also concluded by the foregoing language, and is overruled.

The sixth exception is as follows: "(6) Because, upon the request of the plaintiff, his honor charged the jury as follows, to wit: 'Any party who makes an excavation in a public highway or street, and carelessly and negligently fails to provide proper safeguards for the protection of the public passing along said highways or streets, is liable in damages to any person injured by reason of such excavations,'—thereby indicating that the mere fact of carelessly and negligently failing to provide proper safeguards for such excavation for the protection of the public passing along the highway or street would make the party liable in damages to any person injured by reason of such excavation, regardless of the fact whether the excavation was known to the party injured, and regardless of the fact whether the party injured was at the time in the proper use of the highway or street." The charge stated correctly the general principle of law, and, if the appellant desired an instruction upon the propositions contained in the exceptions, requests to charge should have been presented to that effect. The exception is overruled.

The seventh exception is as follows: "(7) Because his honor, upon request of the plaintiff, charged the jury as follows, to wit: 'Under that charter the mayor and aldermen of the city of Columbia had the power and authority to pass the ordinances which have been introduced in evidence in this case, and such ordinances are valid and binding upon the defendant railroad company in its use and occupancy of the streets of said city,'—thereby expressing an opinion on the facts of the case, to wit, that the ordinances in question were valid and binding, regardless of the question whether they had

been properly passed and promulgated; and thereby further indicating that the breach of such ordinances, even if properly passed and promulgated, should be taken into consideration by the jury in determining the defendant's liability, although such ordinances were not pleaded, and no breach of their provisions alleged." The objection to the introduction of the ordinances in evidence was on the ground that they had not been pleaded, and not that they had not properly been passed and promulgated. His honor used the language quoted in the exception in giving construction to the ordinances, and without any intention of invading the province of the jury. The charge, when considered in its entirety, sustains this interpretation of his language. The other part of the exception has already been disposed of. This exception is overruled.

The eighth exception is as follows: "(8) Because his honor charged the jury as follows, to wit: 'It is a question of fact for you to say, under the evidence in this case, whether or not the defendant has violated the provisions of the ordinance giving it a right of way through certain streets of the city of Columbia, or in fact of any of the ordinances that have been introduced in evidence. I charge you, however, that if you find from the evidence that any of the provisions of the city ordinances have been violated, and that the injury complained of resulted from such violation, then such violation is a circumstance from which negligence may be inferred,'—thereby indicating as a fact that the violation of such ordinance would be a circumstance from which negligence might be inferred, and also thereby indicating that the jury might take into consideration the violation of an ordinance not pleaded, when no violation thereof was alleged." We do not think it is longer an open question in this state that the violation of an ordinance is at least a circumstance from which negligence may be inferred. The other question raised by the exception has already been considered. The exception is overruled.

The ninth exception is as follows: "(9) Because, upon request of the plaintiff, his honor charged the jury as follows, to wit: 'This is an action for punitive or exemplary damages. In such an action the jury may allow such an amount as they deem proper, within the limit of the amount demanded in the complaint, by way of punishment to the defendant, and to deter the defendant and all other persons from the commission of similar wrongs in the future by the example thereby afforded. Punitive or exemplary damages are recoverable where there is evidence of gross negligence or recklessness or wanton disregard of the rights of others,'—thereby indicating—First, that, although there was no allegation of willfulness or intentional injury on the part of defendant, that, nevertheless, this was an action for punitive or exemplary damages; and, second, thereby further indicating that punitive or exemplary damages are recoverable where there is evidence of 'gross negligence or recklessness or wanton disregard of the

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rights of others,' although there was no evidence of willfulness or intentional injury on the part of the defendant; and, third, thereby further indicating that in such an action it was not necessary that the 'gross negligence or recklessness or wanton disregard of the right of others' should be established by a preponderance of the testimony, but that they could be established by any evidence thereof." The first subdivision cannot be sustained, because it has been shown that there are allegations of willfulness or intentional injury on the part of the defendant. We will next consider subdivision 2, which raises the question that punitive or exemplary damages are not recoverable as there was no evidence of willfulness or intentional wrong on the part of the defendant. This was a question for the jury, in view of all the facts and circumstances in the case. In 16 Am. & Eng. Enc. Law, 392, 395, it is said: "The element which distinguishes actionable negligence from criminal wrong or willful tort is advertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty—that is, he cannot be conscious that it is a want of ordinary care—without subjecting himself to the charge of having inflicted a willful injury, because one who is consciously guilty of a want of ordinary care is, by implication of law, chargeable with an intent to injure; malice being but the 'willful doing of a wrongful act.' * * * 'Negligence' and 'willfulness' are the opposites of each other. They indicate radically different mental states. The distinction between negligence and willful tort is important to be observed, not only in order to avoid a confusion of principles, but is necessary in determining the question of damages, since, in case of an injury by the former, damages can only be compensatory; while in the latter they may also be punitive, vindictive, or exemplary." The court, in *Pickens v. Railway Co.*, 54 S. C. 505, 32 S. E. 569, after quoting with approval the foregoing language, says: "The complaint alleged intentional wrong, and the plaintiff had the right to introduce testimony having only a remote causal connection between the alleged wrongful act and the injury resulting therefrom, in order that the jury might have all the facts and circumstances before them in estimating the exemplary damages." Again: "In an action for a willful tort the jury has the right to take into consideration two elements of damages: (1) Compensation for the injury sustained, as to which the plaintiff is confined to a recovery of such damages as flow naturally and proximately from the wrongful act; and (2) the conduct of the defendant, for which the plaintiff is entitled to recover exemplary damages, sometimes called 'punitive' or 'vindictive' damages. The exemplary damages are in addition to the compensatory damages. *Duckett v. Pool*, 34 S. C. 311, 13 S. E. 542." The question presented by the third subdivision cannot be sus-

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tained, as the charge, when considered in its entirety, shows that his honor instructed the jury that the facts alleged in the complaint must be proved to their satisfaction by the preponderance of the evidence. This exception is overruled.

The tenth exception is as follows: “(10) Because, upon request of the plaintiff, his honor charged the jury as follows, to wit: ‘If the jury believe from all the evidence that the defendant company is liable to the plaintiff for any actual damages for the injuries sustained by him, then, in fixing the amount of damages, they may consider * * * the pecuniary loss which he has already sustained by reason of his injury, and also that which he is likely to sustain in the future by reason of such injury,’—thereby indicating that it was proper for the jury to surmise what would likely be the pecuniary losses of the plaintiff for all time to come, and to render a verdict therefor.” The plaintiff’s tenth request, which gave rise to this exception, is as follows: “(10) If the jury believe from all the evidence that the defendant company is liable to the plaintiff for any actual damages for the injuries sustained by him, then, in fixing the amount of the damages, they may consider his loss of time, the expense incurred by plaintiff by reason of his injury, the physical and mental pain and suffering which he has already endured by reason of his injury, and also that which he is likely to experience in the future by reason of such injury, the impairment of his health and powers of locomotion resulting from his injury, the pecuniary loss which he has already sustained by reason of his injury, and also that which he is likely to sustain in the future by reason of such injury; and, in this connection, standard life and annuity tables showing the probable duration of life and the present value of a life annuity are competent evidence to assist the jury in making their estimate of the damages.” In his argument the appellant’s attorney says: “It is true that in an action for personal injuries it is competent for the jury to award to the plaintiff compensation, not only for past pain, but also for pain which, by the ordinary course of nature, it is apparent the party injured will suffer in the future; and that present compensation for pecuniary loss already suffered, and for present destruction of or injury to the capacity to earn in the future, may be taken into consideration by the jury. This, however, is intended as the only method of ascertaining the present injury to the party, and is based upon present existing conditions. It is also true that pecuniary loss which has occurred up to the trial of the action as a direct result of the injury may be shown, such as expenditures for medical bills, medicine, etc.; but the jury cannot, under any circumstances, be allowed to infer that the plaintiff will incur future expenditures for any such purpose, or to surmise as to the amount of such future pecuniary loss.” The charge intended that the jury should

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take into consideration such elements of damage as it is admitted by the appellant's attorney were properly recoverable, and this exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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(Court of Appeals of Kentucky, Feb. 12, 1902.)

[66 S. W. Rep. 606.]

Accident at Crossing—Punitive Damages.*

Punitive damages may be awarded against a corporation for an injury resulting from the gross negligence of its servants.

Same—Gross Negligence.†

"Gross negligence" was properly defined, in an instruction to the jury, as the failure to exercise slight care.

Excessive Verdict.

Though plaintiff does not seem to have suffered any severe or permanent injuries, and did not himself consider it necessary to call in a physician,—merely complaining that for some two months or more he did not have the full use of his arm, and for some weeks suffered from dizziness in the head,—a verdict for \$825 will not be set aside as excessive, in view of the fact that one verdict has already been set aside upon that ground, and that the jury was properly instructed that it might award punitive damages.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Action by J. R. Dodge against the Chesapeake & Ohio Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Simrall & Calvin, for appellant.

B. F. Graziani, for appellee.

DU RELLE, J. Appellee in February, 1898 (being then 79 years of age), was driving out of Covington to his home, in Kenton county, in a two-seated vehicle, with the top down, and his wife and another lady on the back seat. At the intersection of Madison avenue and Seventeenth street the appellant company has a crossing, at which it maintains safety gates. Appellee, driving in the rear of several other vehicles, had not gotten entirely across, when the safety gates or poles were lowered; there being two on each side of the crossing. One of the poles striking his horse on the back, the horse plunged forward and broke off the end of one of the poles, which struck appellee on the arm and head. The horse, which was a gentle animal, was readily stopped, Mr. Dodge's contusions were dressed in a neighboring drug store, the

*See Illinois Cent. R. Co. v. Stewart (Ky.), 21 Am. & Eng. R. Cas., N. S., 874, and foot-note.

†See Macon v. Paducah St. Ry. Co. (Ky.), 22 Am. & Eng. R. Cas., N. S., 614, and foot-note.

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ladies were taken where they wished to go, and later in the evening he drove out to his home. He does not seem to have suffered any very severe or permanent injuries, and did not himself consider it necessary to call in a physician, but complains that for some two months or more he did not have the full use of his arm, and for some weeks suffered from dizziness in the head. Having brought suit, alleging gross negligence in the lowering of the gates, he obtained a verdict for \$1,200, which was set aside as excessive by the trial court. A subsequent trial resulted in a verdict and judgment for \$825.

It is complained, first, that no case has been made out upon which the jury was authorized to award punitive damages, which were allowed by the instructions to be given if the jury should find the negligence to be gross. But in *Railroad Co. v. Stewart* (Ky.) 63 S. W. 596, the cases relied on as holding that punitive damages may only be awarded where the conduct of the negligent party is such as to evidence malice, or a reckless disregard of the safety of others, or a wanton injury, were considered and overruled.

We do not think the instruction that gross negligence was the failure to exercise slight care was erroneous. Such an instruction has been frequently recognized by this court as proper. See *Railroad Co. v. Kelly's Adm'x*, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452; *Greenwood v. Coal Co.*, 14 Ky. Law Rep. 336; and numerous other cases.

The law embodied in the instructions asked for by appellant seems to have been substantially given in the instructions which were given by the court.

The objection upon the ground that the damages were excessive is urged with great force; but, in view of the fact that one verdict has already been set aside upon that ground, we are not disposed to disturb the finding of the jury, especially in view of the fact that the instructions authorized the jury, in their discretion, to award punitive damages, and that such an instruction has been recently recognized by this court as proper to be given. Judgment affirmed.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. CO.
(AMERICAN TRADING CO., Intervener.)

(Circuit Court, S. D., New York, January 18, 1902.)

[112 Fed. Rep. 829.]

Common Carriers—Goods—Delay—Contraband of War.*

The receiver of a railroad company having a contract with a Pacific steamship company for interchange of traffic accepted a quantity of pig lead to be carried to Japan, and received the freight therefor, delivering to the shipper a bill of lading "subject to delay." The lead was forwarded to Tacoma, and seasonably put on board a steam-

*See 9 Cent. Dig., col. 354 et seq.; *Carter v. Wilmington & W. R. Co.* (N. Car.), ante, 131, and extensive note, 134 et seq.

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ship about to sail for Japan, when the deputy collector refused to clear the vessel with the lead on board, as contraband of war, China and Japan then being at war. The lead was therefore unloaded and left, and was not delivered at Japan until its value there was considerably reduced: *held*, that the receiver was not liable for the damage resulting from such delay.

Same—Clearance of Vessel—Nature of Shipment.

While it may be the duty of a common carrier receiving freight for transportation by rail and beyond the seas ordinarily to provide for the clearance of the vessel in which the goods are to be shipped, the shipper cannot complain of failure to obtain such clearance when it is prevented by the nature of the shipment.

In Equity.

Frederic B. Jennings and Howard Van Sinderen, for petitioner.

Edward B. Hill, for petitionee.

WHEELER, District Judge. The Northern Pacific Railroad Company had a contract with the Northern Pacific Steamship Company for interchange of traffic between points in the United States and Asiatic ports, by the terms of which the railroad company had the exclusive right to appoint agents in the United States, and the steamship company thereby authorized the railroad company "and its appointed agents to act as agents for" it, "and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for the Asiatic points served by the steamships." The receivers of the railroad company authorized by the court to carry on its business continued to act under this arrangement, and had an agent at New York. In September, 1894, during the war between China and Japan, the intervener, the trading company, obtained of him rates, which it accepted, for carrying 200 tons of pig lead from Newark, N. J., by steamship from Tacoma sailing October 30th, to Yokohama, Japan. The freight was paid to the receivers, a bill of lading "subject to delay" was delivered to the trading company, and received without objection and negotiated, and the lead was forwarded to Tacoma, and seasonably put on board the steamship to sail for Yokohama October 30th. The deputy collector refused to clear the vessel with the lead on board, as contraband of war, and it was unloaded and left. The next vessel refused to take it, and when it arrived at Yokohama it had fallen \$26,704.02 from the contract price at which it was to be received from the steamship sailing October 30th. This petition is brought to charge those who have by sale under decree received the property from, and subject to the obligations of, the receivers, with this loss.

It is obvious from this brief statement that the delay and consequent loss arose from the official act of the deputy collector, lawfully authorized, whether well founded or not, with reference to the nature and uses of this very property, and not from anything done or omitted by or for the receivers. The granting of the clearance was within the jurisdiction and

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authority of the collector, and the departure without one was prohibited by law, and would have exposed the master of the vessel to a penalty. Rev. St. § 4197. The refusal, although not well founded, was not within the control or responsibility of the receivers, as it did not relate to anything with which they had to do, but only to the nature of this shipment. The case in this respect is like *Railroad Co. v. Baker*, 39 C. C. A. 237, 98 Fed. 694, 50 L. R. A. 201, where a passenger was injured on the tracks of another road in the line of the plaintiff in error by the negligence of those engaged under a law of the state in changing tracks; and it was held, reviewing the cases where carriers had been holden for what occurred on the lines of others, that the law excused the plaintiff in error for what was being done, although negligently, under it. The circuit court of appeals said (Lacombe, J.): "It will be observed that through all these cases there was an element of choice,—the power to act or to refrain from acting." And, after asking if the other company would have been liable if the plaintiff had been one of its passengers, answered: "We think not. That road had no choice left to it." Here the steamship, if the receivers were responsible for its movements, had no choice left to it but to leave the lead. That was detained by the superior power of the government.

It is said that it belonged to the receivers to provide for the clearance of the vessel, which might be true as to anything else; but it would seem that the shipper could not complain of the carrier for the want of a clearance which the nature of the shipment prevented.

The trading company claims that earlier notice of the situation should have been given, but there is nothing to show that it would have saved, or have given opportunity to save, any part of the loss, or that an earlier shipment would. This view obviates examination as to whether the receivers were liable beyond delivery to the steamship company.

Petition of intervention dismissed.

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(*Court of Appeals of Kentucky, Dec. 4, 1901.*)

[65 S. W. Rep. 334.]

Carriers—Excessive Freight Charges—Construction of Contract.*

Where a contract for the shipment of tan bark provided for the payment of a certain rate per hundred pounds for car load lots delivered at a point named, if it was necessary to pass over other lines or to pay switching charges at terminals the rate fixed covered those items, and, as there was no mention of weights or tariff provisions, a car, when accepted by the carrier, was taken at the car load rate, though it was not filled.

*As to the construction of shipping contracts, see generally, 2 Rap. & Mack's Dig. 156 et seq.

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Appeal from circuit court, Carter county.

“Not to be officially reported.”

Action by M. J. Dobbins against the Chesapeake & Ohio Railway Company to recover excessive freight charges paid. Judgment for plaintiff, and both parties appeal. Affirmed.

E. B. Wilhoit and John T. Shelby, for appellant.

Theobald & Theobald, for appellee.

WHITE, J. The appellee, Dobbins, brought this action to recover \$949.10 alleged overcharges in freight which he charges was paid appellant upon a contract of shipping tan bark by the car load. With the petition is filed a statement of the several sums making the total claimed.

Appellant admitted collecting \$844.50 of the sums stated, and pleaded offset of \$362.50, which is alleged to have been credited to appellee on his regular freight charges; and also the further offset of \$312.22, which appellant claimed it was entitled to by reason of the fact that under its published tariff rate in existence at the time of the contract with appellee it was provided that the 11 cent rate, which appellee was given, was based on a minimum weight per car of 24,000 pounds, and appellant claimed freight on each car as if it weighed 24,000 pounds, the \$312.22 being the difference between the freight actually collected and what should have been collected with each car, up to 24,000 pounds. On account of the numerous items in dispute, the court referred the matter to a commissioner, after transferring to equity. Proof was taken, and the commissioner made a report as to collections and payments, charges, weights, etc. Upon trial of the cause, on exceptions to the commissioner's report, the court gave appellee judgment for \$482, being the difference between \$844.50 collected by appellant and \$362.50 credited to appellee. The court refused to allow the \$312.22 claimed by appellant. From that judgment both parties have appealed.

The proof shows conclusively that appellee made a special contract with appellant's agent for a rate of 11 cents from the place of loading to McLean avenue, Cincinnati. This was in writing,—a letter,—and no mention is made of a tariff rate or of minimum weights per car. We think this letter, being the contract, provides for the payment of 11 cents per 100 pounds for car load lots of bark delivered at McLean avenue, Cincinnati, and appellant was entitled only to that freight charge. If it was necessary to pass over other lines or to pay switching charges at terminals, the 11 cent rate covered those items. As there was no mention of weights or tariff provisions, the rate was per car load, regardless of weight of the car. Appellant might have refused to receive a car, not filled, at the car load rate, but when it took a car load it was at 11 cents per 100 pounds.

The proof conclusively shows that appellant collected of appellee \$844.50 under the item “switching charges,” to which

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it was not entitled under its contract. This amount found by the court is clearly correct. It is also shown that appellant on some bills, instead of collecting the full freight charge by the contract rate, would deduct \$2.50 for switching, so that there was collected of appellee on that bill \$2.50 less than was actually due for freight. Appellee would then pay on the same account for that car switching charges from \$4 to \$6. As the payments at \$4 or \$6 are included in the sum of \$844.50 as paid by appellee, he was properly charged by the court below by the amount of deductions, at \$2.50, that was made from his freight bills. The itemized statement filed with the answer, and testified to by appellant's agent, and not contradicted, shows these deductions, at \$2.50, amount to \$362.50; there being such deduction of \$2.50 each on 145 bills. It was therefore proper to allow appellant credit as set-off by that sum.

In our opinion, the judgment rendered is in strict accord with the facts proven, and contains no error. Judgment affirmed on both original and cross appeals.

MCLAGAN v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, Feb. 14, 1902.)

[89 N. W. Rep. 233.]

Whether Initial Carrier Bound by Statements of Its Agent as to Rates of Connecting Carrier.*

Where the contract between a carrier and a shipper, as evidenced by the bill of lading, is that the goods shall be transported over the carrier's line to a certain place, and delivered to another carrier for transportation to their destination, the receiving carrier is not bound by statements of its station agent as to the rate that would be charged by the connecting carrier.

Same—Burden of Proof.

In an action by the shipper against the receiving carrier to recover the difference between the amount alleged to have been stated by the agent as the rate over the lines of the connecting carrier and that actually charged, the burden of proof to show that the station agent had authority to bind his company was on plaintiff.

Same—Pleading.

A general denial by defendant raised an issue as to whether the agent's statements bound the receiving carrier.

Appeal from district court, Carroll county; S. M. Elwood, Judge.

Action for excessive freight charges. Judgment on directed verdict for the defendant. The plaintiff appeals. Affirmed.

Lee & Robb, for appellant.

Hubbard, Dawley & Wheeler, for appellee.

LADD, C. J. The plaintiff bought and shipped over the defendant's railway to Chicago, Ill., and over the Baltimore

*See Sutton v. Chicago & N. W. Ry. Co. (S. Dak.), 20 Am. & Eng. R. Cas., N. S., 726, and note, 728 et seq.

& Ohio Railway from there to Cumberland, Md., two car loads of corn from Odebolt, Iowa, one from Correctionville, and three from Carroll. The rate exacted upon delivery at Cumberland by the Baltimore & Ohio Railway Company was 28 cents per 100 pounds. The plaintiff claims that, having received a bid for 5,000 bushels of corn, he made inquiry of a bill clerk in the defendant's freight house at Carroll concerning the rate of carriage of corn in car-load lots to Cumberland, who named 22½ cents per 100 pounds, and that in reliance on this rate the plaintiff bought and shipped the corn. On the other hand, the clerk denies having had any conversation on the subject, or being possessed of authority to fix the charges beyond the terminus of the defendant's lines. The freight charges were not inserted in the bill of lading, and whether plaintiff met with any loss in the transaction is not shown. Evidently, then, unless this clerk had authority to make contracts fixing freight charges beyond the defendant's road, the company is not liable. The record contains no evidence that such power had been expressly conferred, and, if possessed at all, it must have been because within the apparent scope of his duties. In the absence of the station agent, he acted in his stead, and in deciding the case he may as well be treated as having the same authority. That he might not negotiate shipments from places other than Carroll appears from *Voorhees v. Railway Co.*, 71 Iowa, 735, 30 N. W. 29, 60 Am. Rep. 823. Nor do we think his employment in the company's local freight house at that place indicated authority to fix rates on connecting lines in remote portions of the country, over which the defendant did not undertake to carry property. It may be that, if it had received the goods simply marked or directed to Cumberland, a point on a connecting line, a contract might be implied to carry to that place, and at the rate fixed by the local agent. *Angle v. Railroad Co.*, 9 Iowa, 487; *Mulligan v. Railway Co.*, 36 Iowa, 181, 14 Am. Rep. 514; *Beard v. Railway Co.*, 79 Iowa, 527, 44 N. W. 803. This is on the theory that, as the company's business is that of a common carrier, it may undertake to convey property to points not reached by its line, and its agent, having the duty to receive goods for transportation, will be presumed to have authority to enter into such agreements in its behalf. But here there was no undertaking to carry the corn beyond the terminus of the defendant's road. The bills of lading receipted for the corn "subject to the conditions and regulations of the published tariff of said company to be transported over the line of this railway to —, and delivered after payment in like good order to —, a company or carrier (if same are forwarded beyond the lines of the company's road), to be carried to the place of destination; it being expressly agreed that the responsibility of this company shall cease at this company's depot at which same are to be delivered to such carrier." Then follows a form of guaranty of rates, left blank,

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based on specified conditions, and this provision: "It is further especially agreed that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the Chicago & Northwestern Railway Company assumes no other responsibility for the safe carriage of or safety than may be incurred on its own road." It was noted on the margin that transportation is to be "via B. & O. R. R." The contract was simply to transport the corn over its own line, and deliver at its depot to the Baltimore & Ohio Railway Company, and there all responsibility ended. In other words, the contract was to carry over its own line, and forward, according to the usual course of business, from its terminus. It was precisely that implied, under the holding in many of the states, from the receipt of goods marked for a particular designation beyond the terminus of its line, without an express undertaking to deliver at that point. And in the states where this rule prevails the decisions are uniform to the effect that a local station agent may not bind his principal for transportation over connecting lines. *Grover & Baker Sewing Mach. Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672, 35 Am. Rep. 444; *Burroughs v. Railroad Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Coates v. Railroad Co.* (S. D.) 65 N. W. 1067; *Wait v. Railroad Co.*, 5 Lans. 477; 4 Elliott, R. R. § 1437; *Hutch. Carr.* § 267 et seq.; 1 Wood, R. R. 165. Not very much evidence seems to be required, however, to carry the issue as to authority to the jury. *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Page v. Railroad Co.* (S. D.) 64 N. W. 137; *Mayall v. Railroad Co.*, 19 N. H. 122, 49 Am. Dec. 149; *Wilcox v. Railroad Co.*, 24 Minn. 269; *Pruitt v. Railroad Co.*, 62 Mo. 527; *Railroad Co. v. Cole* (Tex. Civ. App.) 28 S. W. 391. Evidently authority is denied on the ground that the agent may not bind the company with respect to the transportation of goods beyond the point to which it, through him, has agreed to carry them. Here the defendant undertook to carry the corn to Chicago; no farther. The station agent's power to fix the rates to that point is not questioned. See *Woods v. Railway Co.*, 68 Iowa, 491, 27 N. W. 473, 56 Am. Rep. 861. Beyond that point it was under no obligation to carry the corn. Nor does it appear to have had a joint rate or other arrangement with the connecting line. In what way, then, was this defendant interested in fixing the charges to be exacted beyond Chicago on another road? None at all. If not, the agent had no apparent authority to do so for it. There is a wide difference between making a contract which shall bind the principal to carry to a point beyond its line for a certain rate and what another company shall charge for transporting from the terminus of the initial line to such point. In the first instance he is acting for the company employing

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him; in the last he is attempting to stipulate, in behalf of his company, what another shall do. Clearly, there was nothing in his situation as local station agent calculated to impress the public with the notion that he was authorized to agree in behalf of defendant to what the charges of the Baltimore & Ohio Company would be. If it be said the rate named by the bill clerk was for through transportation by the defendant, a sufficient answer is that the written contracts accepted by employees acting for the plaintiff stipulated otherwise. No claim is made but that the contents of the bills of lading were understood, nor is there any doubt that shipments were actually made according to their terms. See *Mulligan v. Railway Co.*, supra. Unless the alleged oral statements had reference to these bills, and shipments thereunder were made in pursuance thereof, nothing has been done by virtue of said alleged oral arrangement concerning rates. It should be noted that there is no evidence whatever in the record as to the clerk's authority, save the showing of the capacity in which he was employed and his undisputed testimony that he was not authorized to fix rates beyond defendant's line. Appellant insists no issue was raised as to the agent's authority. Unless he had power to act for the defendant, it did not enter into any agreement. Hence the burden of proof to show that he, by his oral statement, bound the company, was on plaintiff, and the issue with respect thereto raised by the general denial.

Affirmed.

HARTLEY v. ST. LOUIS, K. & N. W. R. Co.

(*Supreme Court of Iowa, Feb. 7, 1902.*)

[89 N. W. Rep. 88.]

Liability for Negligence of Connecting Carrier.*

At common law a common carrier is not liable for the negligence of the employees of a connecting carrier, in the absence of any contract to that effect.

Limiting Liability—Negligence of Connecting Carrier—Statute.

Code, § 2074, providing that no contract shall exempt a railway corporation from a liability which would have existed had no contract been made, does not invalidate the limitation of liability in a contract by which a railroad company contracted to transport property from one point to another, necessarily involving the use of connecting lines, and by the same instrument provided that it should not be liable for negligence of such connecting carriers.

Same.

Where a common carrier contracts to transport goods from one point to another, necessarily over connecting lines, it is not prevented on grounds of public policy from contractually limiting its liability for the negligence of the connecting carriers.

Same—Same—Sufficiency of Evidence.

Where the consignor of property which a railroad company agreed to transport from one point to another, partially over connecting

*See *Cincinnati, etc., Ry. Co. v. N. K. Fairbanks & Co.* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 179, and notes, 187 et seq.

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lines, signed and received from the connecting lines bills of lading in which they assumed all liability, there was sufficient evidence that such consignor did not regard the original carrier as having assumed a carrier's liability for the entire distance.

Liability Where Stock Is Loaded beyond Terminus, and Bill of Lading Is Accepted from Connecting Carrier.

Where a carrier contracted to ship stock beyond its own line on a connecting line, it is not liable to the consignor for stock loaded at a point beyond its terminus, and for which the consignor accepted a bill of lading from the carrier operating it at such place.

Appeal from district court, Henry county; James D. Smythe, Judge.

Action to recover the value of a horse injured, as is alleged, while being transported from Oswego, Kan., to Yoakum, Tex., through the negligence of the agents and servants of the Missouri, Kansas & Texas Railway Company. Defendant is sought to be held liable on a contract of affreightment issued by its station agent at Houghton, Iowa, for through shipment of certain stock from that point to Yoakum, Tex. A jury was called, and at the close of plaintiff's evidence defendant moved for a verdict. The motion was sustained, and plaintiff appeals. Affirmed.

McCoid & Finley, for appellant.

Trimble & Trimble and Babb & Babb, for appellee.

DEEMER, J. The bill of lading issued by defendant's agent at Houghton, Iowa, contained the following: "Live Stock Contract. * * * Finish loading at Oswego, Kansas. No. and initial of car: 1,590; Arm's Palace Horse Car. Number of animals in each car, seven." "That for and in consideration of \$141.60 per car, subject to minimum weights as shown in published tariffs, the said railroad company agrees to transport one car loaded with horses (number of car, number of waybills, and number of animals as noted above) from Houghton, Iowa, to Yoakum, Texas; and the said first party, in consideration thereof, agrees to deliver the said animals to the said railroad company, for transportation between the points aforesaid, upon the following terms, viz.: * * * Nor shall said railroad company be liable for any loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line; but, nevertheless, in the event that the said animals are to be transported beyond the line of the railroad of the second party upon and by any connecting line forming a part of the system known as the 'Burlington Route,' then it is expressly understood and agreed that this contract shall be for, and inure to the benefit of, the corporation operating such connecting line, and such connecting line shall be liable to perform the obligations of this contract." Pursuant to this contract, W. J. Hartley, plaintiff's brother, loaded seven horses in the car therein described, and defendant transported the car, with its contents, to Hannibal, Mo., the terminus of its line, and made

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timely delivery thereof to the Missouri, Kansas & Texas Railway Company. The latter company took possession of the car, and issued to Hartley a new bill of lading therefor, whereby it undertook to transport the car from Hannibal, Mo., to West Point, Tex. This bill of lading was signed by the company issuing it and by Hartley himself. As he (Hartley) desired to put more stock in the car, it was stopped at Oswego, Kan., a point on the Missouri, Kansas & Texas line, and seven more horses and one mule were put into the car by Hartley, according to agreement as indicated on the face of the original bill of lading. After these animals were added to those originally placed in the car, the Missouri, Kansas & Texas Railway Company, through its agent at Oswego, issued a new bill of lading to Hartley, similar to the one entered into at Hannibal, Mo. This was also signed by Hartley, and it expressly provided that the Missouri, Kansas & Texas Railway Company should transport the 15 head of horses from Oswego to West Point en route to Yoakum. The car was then taken by the last-named company, and by it transported to its destination. While en route from Oswego to West Point, one of the horses loaded at Oswego was injured at or near Denison, Tex., through the negligence and carelessness of the employees of the Missouri, Kansas & Texas Railway. Plaintiff contends that defendant is responsible for this negligence, for the reason that its contract is one of through shipment from Houghton, Iowa, to Yoakum, Tex., and that it cannot limit its liability under such contract, because of section 2074 of the Code, which reads as follows: "No contract, receipt, rules, or regulations shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, * * * which would exist had no contract, receipt, rule, or regulation been made or entered into." He also relies on a general rule of the common law to the effect that a common carrier cannot by contract limit its liability for negligence.

So well settled is the rule that a common carrier is not liable for the negligence of the employees of a connecting line in the absence of contract, express or implied, that we need not cite authorities in its support. At common law the duty of an independent carrier was performed when it safely and punctually transported the goods over its own line, and delivered them to the consignee, or to a connecting carrier. The initial company, in the absence of contract, is regarded simply as a forwarding agent, and is not liable for the default of subsequent carriers. *Beard v. Railway Co.*, 79 Iowa, 527, 44 N. W. 803; *Cobb v. Railroad Co.*, 38 Iowa, 601; *Mulligan v. Same*, 36 Iowa, 181, 14 Am. Rep. 514. We need not go into the question of the quantum of evidence necessary to support such an agreement, for it is clear, we think, that defendant received and agreed to transport seven of the horses from Houston to the point of destination. It is enough for

our present purpose to say that the section of the Code relied upon does not apply, for the reason that, in the absence of contract, defendant was under no common-law liability for the negligence of the Missouri, Kansas & Texas Railway Company. In construing this statute it would be ridiculous to say that a contract which expressly limits liability shall be held to create one at common law. Without the contract defendant would not be liable for the negligence of a connecting carrier. This is plain. But it is said that because of the contract it is liable, and cannot limit that liability by and through the very contract which is said to create it. If no contract, receipt, rule, or regulation had been made in this case, there would be no liability. There was a contract, which plaintiff contends creates a liability, and it is said that this liability cannot be limited. This view entirely overlooks the fact that the liability is created by contract, and not by law, and in such cases the statute quoted has no application. This proposition seems so clear that no further argument is necessary. But plaintiff contends that, as defendant agreed to be responsible for the goods to their destination, it cannot limit its responsibility by contract; that it voluntarily assumed the obligations of carrier over the whole route, and made of the connecting carriers agents, for whose conduct it is responsible; and that it is contrary to public policy to allow it to limit its liability, or that of its agents, for negligence. This argument is specious, to say the least, and it has received the sanction of some of the courts of the country. See *Ireland v. Railroad Co.* (Ky.) 49 S. W. 188; *Id.*, 453; *Galveston Railway Co. v. Allison*, 59 Tex. 193; *Halliday v. Railway Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Railroad Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Condict v. Railway Co.*, 54 N. Y. 500. In the first of these cases there was a strong dissenting opinion, which we think announces the better rule. The *Galveston Case* is fully explained and distinguished in *McCarn v. Railway Co.*, 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51, where the true rule, as we understand it, was announced as hereinafter stated. In the New York case the delay was not of a connecting carrier, but by the initial one, as we understand it. And in a late case in Missouri it is held that, even in the face of a statute expressly providing that the initial carrier shall be liable for loss or injury to goods wherever occurring, a carrier may by contract limit its liability to injuries occurring on its own line. *Dimmitt v. Railroad Co.*, 103 Mo. 433, 15 S. W. 761. But see *McCann v. Eddy* (Mo.) 33 S. W. 71, 35 L. R. A. 110. As we understand it, the connecting lines in the *Pontius Case* were either held to be partners, or there was such a traffic arrangement between them as made the two lines practically one. The great weight of authority supports the proposition that extraterminal liability may be excluded by express contract. See *Railroad Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Tolman v. Abbot* (Wis.) 47

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N. W. 264; Berg v. Railroad Co., 30 Kan. 561, 2 Pac. 639; Railroad v. Avant (Ga.) 5 S. E. 78; Railroad Co. v. Thomas (Ala.) 3 South. 802; Railroad Co. v. Odom (Ark.) 38 S. W. 339; Jones v. Railway Co. (Ala.) 8 South. 61; McCarn v. Railway Co. (Tex. Sup.) 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51; Ortt v. Railway Co., 36 Minn. 396, 31 N. W. 519; Railroad Co. v. Tarter (Ky.) 39 S. W. 698; Pendergast v. Express Co., 101 Mass. 120; McEacheran v. Railroad Co., 101 Mich. 264, 59 N. W. 612; American Exp. Co. v. Second Nat. Bank of Titusville, 69 Pa. 394, 8 Am. Rep. 268. Our own cases do not run counter to this rule, but, in so far as they shed any light on the question, sustain it. In Mulligan's Case it was held: First, that acceptance of goods by a carrier marked to a destination beyond the terminus of its road creates a prima facie liability to deliver at that point; second, that a bill of lading limiting liability in such a case is valid and binding; and, third, that under the facts appearing in that case defendant was not liable. During the course of the opinion the court, through Day, J., used this significant language: "But the law does not impose upon such carriers the duty of undertaking to transport goods beyond the termini of their respective routes. Whenever liability for such transportation exists, it arises either from express contract or from an implied agreement arising from the acceptance of goods consigned to points beyond the termini of their routes. As they are originally under no obligation to undertake to transport beyond the end of their lines, it is clear that they may, by special agreement, stipulate that they shall not be liable beyond such point. The effect of the agreement in this case is that the defendant did not assume the duties of a common carrier beyond Cairo, the southern terminus of its road. It is clear to us that, if this contract was so accepted or acted upon by the plaintiff as to be binding upon him, that the defendant is not liable for a loss occurring beyond the limit of its road." In Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573, there was a partnership arrangement between the different companies involved. This brought the case clearly within one of the well-recognized exceptions to the general rule heretofore stated. See, also, Block v. Freight Line (Mass.) 1 N. E. 348. In Robinson v. Transportation Co., 45 Iowa, 470, the contract was to ship "through, without transfer, in cars owned and controlled by the company." The defendant failed to comply with its contract, but unloaded the goods, and stored them in a warehouse, where they were burned during the Chicago fire. It was held that the taking of the goods from the cars and storing them in a warehouse defeated the exemption contained in the bill of lading. The same facts appeared in Stewart v. Transportation Co., 47 Iowa, 229, 29 Am. Rep. 476. In each of these cases the court makes it clear that the question involved was the rights of the parties where the carrier violated the terms of the contract as to the mode of transporta-

tion and the exemption was loss by fire. The supreme court of Texas, in McCarn's Case, *supra*, found that the contract was for a through shipment from San Antonio, Tex., to Chicago, Ill., and there was a limitation clause similar to the one in the contract before us. Speaking to the point now under consideration, that court said: "That in such a case a carrier may, by contract, protect itself against liability for loss not occurring on its own line, whether the shipment be wholly within the state or be interstate, we had deemed a settled question in this court," citing numerous cases. In England, and in some of the states of the Union, the mere receipt of goods to be carried to a destination beyond the line of the carrier who first receives them is held to evidence a contract to transport to such destination, while in others such receipt is not held to evidence a contract to convey beyond that carrier's line; but in the jurisdiction in which these diverse rulings are made there is a general concurrence of opinion on the proposition that the carrier may, by special contract, exempt itself from liability for an injury to freight resulting after it has gone into the hands of another carrier to be transported to destination. The ground of concurrence is contract, which in some jurisdiction it is held is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination; while in others it is held that, in the absence of special contract, no such liability rests on the receiving carrier for injuries occurring after it has safely passed the freight to a connecting carrier. * * * Any one of the companies may agree that over the whole route its liability may extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Can an obligation based alone on contract arise in the face of an express agreement that it shall not exist? There can be but one answer: Under the weight of American authority the contract in this case does not operate as a restriction on or exemption from liability, for to give that liability it, but for the contract, must have existed, while the contract was, in effect, an express agreement that no such liability existed or was intended or understood to exist." These extracts hardly do justice to the writer of the opinion, who, as it seems to us, has in a masterly way demonstrated the fallacy of a contrary view. The whole opinion is worthy of reproduction, but we are not justified in quoting from it further. That plaintiff did not understand defendant was assuming to transport the goods to destination, and taking upon itself the liability of a common carrier for the entire distance, is fully sustained by the testimony. He elected to treat the connecting carriers not as agents of the defendant, but as his own agents, and he received from them bills of lading which he signed, wherein the connecting carriers assumed

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all liability for the transportation of the stock. Moreover, the defendant never received the animal which was injured, unless it be said that delivery to a connecting line was a delivery to the defendant. That might be affirmed in some instance, but not here, we take it, for the Missouri, Kansas & Texas Railroad issued a bill of lading specifically covering the animals loaded at Oswego, Kan., which bill of lading was not only delivered in duplicate to plaintiff's brother, but also signed by him, before the car was started from Oswego. Some other matters are discussed, but, in view of what has been said, no pronouncement need be made therein.

The motion for a directed verdict was properly sustained, and the judgment is affirmed.

FELTON v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Feb. 5, 1902.)

[40 S. E. Rep. 746.]

Carriers—Shipment of Freight—Connecting Lines.*

It affirmatively appearing from the evidence of the plaintiff as a witness in his own behalf that no contract of affreightment was entered into between himself and the defendant, binding it to transport his goods beyond its own line, it follows, under section 2298 of the Civil Code, that the company was liable only to its own terminus, and until delivery to the next connecting road. There was no evidence of any negligence on the part of the defendant company, and the judgment of nonsuit which was granted was therefore proper.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by W. H. Felton against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. Felton and Hatcher, Guerry & Hall, for plaintiff in error.
W. D. Kiddoo, for defendant in error.

PER CURIAM. Judgment affirmed.

PARKINSON v. CONCORD STREET RAILWAY.

(Supreme Court of New Hampshire, Merrimack, Sept. 5, 1901.)

[51 Atl. Rep. 268.]

Instructions.

The rule that a verdict will not be set aside because the instructions given are not sufficiently specific, where no request for more definite instructions has been made, is not applicable where the instruction is given in response to a written question from the jury after their retirement and adjournment for the day, and without the knowledge of counsel.

*See preceding case and foot-note.

Parkinson v. Concord Street Railway

Failure of Motorman to Use Due Care after Discovery of Plaintiff's Peril.*

One who negligently goes upon a street railway track may nevertheless recover, if the motorman, after discovering his dangerous situation, could have avoided injuring him by due care, and he himself could not have escaped after discovering the approaching car.

Misleading Instructions.

In an action against a street railway for personal injuries, where the jury, after retirement, sent to the presiding justice a written question,—whether negligence on plaintiff's part would preclude his recovery, without regard to whether the motorman was using due care,—the justice's reply that "if the plaintiff was not using due care, and his want of it was the cause of, or directly contributed to, the injury, he cannot recover, even if the motorman was also in fault," was objectionable, because not sufficiently specific; tending to make the jury understand that, whatever the circumstances, plaintiff's negligence would preclude recovery.

Exceptions from Merrimack county.

Action by William Parkinson against the Concord Street Railway. Verdict for defendants, and plaintiff excepts. Exceptions sustained.

The plaintiff was traveling with a horse and wagon in the highway in which the defendants' electric road runs. While crossing the defendants' track to reach a public watering trough, he was struck by the defendants' car, thrown from his wagon, and injured. The plaintiff claimed that the accident was caused by the carelessness of the motorman in not seasonably stopping the car upon discovering the plaintiff upon the track. The defendants claimed that the accident was due to the plaintiff's negligence in going upon the track without taking any precautions to learn if a car was approaching. Each party claimed to be free from fault. Evidence was offered in support of these conflicting claims. In the course of his charge to the jury, the court, in speaking of the defendants' duty, said: "They are bound to give the traveler due warning of the approach of their cars, so that he may not be injured, and to use every practical exertion to stop the car if the traveler is unavoidably or negligently on the track or in the way. So, here, if there was reasonable cause to apprehend that the team would come upon the track in front of the car, either unavoidably or through the plaintiff's negligence, it was the duty of the defendants' motorman to use all reasonable and practicable exertions to stop the car, and thus avoid injury to the plaintiff." After the retirement of the jury for the consideration of the case, and after adjournment for the day, the jury sent to the presiding justice a written question, as follows: "Did we understand you to say that, if the plaintiff was not using due care, he could recover no damage, without regard to whether the motorman was or was not using due care?" To this question the presiding justice replied as follows: "If the plaintiff was not using due care, and his want of it was the cause of, or directly contributed to, the injury,

*See generally, note, 12 Am. & Eng. R. Cas., N. S., 332 et seq.

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he cannot recover, even if the motorman was also in fault." This question was propounded, and the answer thereto given by the presiding justice, without the knowledge of counsel upon either side. It came to the knowledge of the plaintiff's counsel for the first time about three weeks after the case was submitted to the jury and the verdict rendered. Immediately upon being informed of the question and answer, the plaintiff's counsel notified the presiding justice that the plaintiff excepted thereto (1) because it was made in the absence and without the knowledge of the plaintiff or his counsel; and (2) because, upon the evidence in the case, the reply was erroneous, in that it did not fully and therefore accurately state the rule or rules of law applicable to the evidence before the jury.

Thomas Madigan, Jr., and Mitchell & Foster, for plaintiff.
Albin & Shurtleff, for defendants.

PARSONS, J. The defendants claimed that the accident was the result of the plaintiff's negligence in attempting to cross the track without making any effort to ascertain whether a car was approaching. If it were found that the plaintiff negligently went upon the track, he could nevertheless recover, if, after his want of care had created the dangerous situation, the defendants by due care could, while the plaintiff could not by like care, have prevented the injury. In other words, if the motorman could, after discovering the plaintiff's danger, by the exercise of care, have prevented the collision, while the plaintiff, after discovery of the approaching car, could not have escaped injury, the defendants' want of care, which, if exercised, would have prevented the injury, was its legal cause, while the plaintiff's negligence was the cause of the danger, merely. *Wheeler v. Railway Co.*, 70 N. H. 607, 50 Atl. 103; *Gahagan v. Railroad Co.*, 70 N. H. 441, 50 Atl. 146; *McGill v. Granite Co.*, 70 N. H. 125, 46 Atl. 684; *Edgerly v. Railroad Co.*, 67 N. H. 312, 36 Atl. 558; *Felch v. Railroad Co.*, 66 N. H. 318, 29 Atl. 557; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159. The jury were properly instructed before the case was submitted to them that the defendants were bound to use every reasonable exertion to stop the car if a traveler were unavoidably or negligently upon the track. The reserved case does not state the fact; but, in the absence of any exception to the original charge, it must be assumed that the distinction between negligence as the cause of the danger and negligence as the cause of, or as contributing to, the injury, was fully and correctly explained to them. The inquiry of the jury indicates that they did not clearly comprehend the distinction; that some, at least, of the jury understood the charge to mean that, under every view of the facts, the plaintiff, if negligent in going upon the track, could not recover. The only negligence charged against the plaintiff was his failure to observe the approaching car. The

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inquiry of the jury, therefore, was whether they had been told that, if the plaintiff's position on the track was due to his want of care, he could not recover. In a popular sense, the plaintiff's being upon the track was the cause of the injury. If he had not gone on the track, there would have been no accident. Such appears to have been the confusion of the jury in *Folsom v. Railroad*, 68 N. H. 178, 44 Atl. 134. In the failure of the jury to comprehend the instructions already given, as exhibited by their question, it is probable that the technical answer given to their inquiry may have led them to understand that the plaintiff's carelessness in going upon the track ended his case. In this situation, the inquiry of the jury, if answered at all, called for an explanation of the legal distinction between negligence as the cause of the danger and negligence as the cause of the injury. If suggested by counsel, the principle would have been stated in some form. The instruction having been given during adjournment, without the knowledge of counsel, the exception must be treated as if made to a refusal to state upon request an elementary proposition applicable to the evidence, and decisive of the plaintiff's rights. In no other way can the lack of opportunity to request instructions applicable to the evidence, and pertinent to the inquiry of the jury, be prevented from prejudicing the parties. So considered, the exception must be sustained. If, as is probable, the jury understood from the technical answer, without explanation, that carelessness of the plaintiff in going upon the track precluded his recovery, upon any view of the subsequent acts of the parties, it is clear that there has been a mistrial, because the jury were thereby precluded from considering a ground upon which they may have thought the plaintiff entitled to recover.

Exception sustained. Verdict set aside.

BLODGETT, C. J., did not sit. The others concurred.

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(*Supreme Court of California, Dec. 31, 1901.*)

[67 Pac. Rep. 765.]

Accident on Track—Negligence of Motorman after Seeing Plaintiff's Peril as Affected by Contributory Negligence.*

Judgment for plaintiff, struck by defendant's street car, cannot be disturbed, though he was negligent in being on the track; there being evidence that the motorman saw his peril in time to avoid the accident, and did not attempt to stop the car.

Same—Same—Instructions.

Defendant cannot complain that the complaint alleged no willful or wanton act; instruction having been given, at its request, that contributory negligence defeats recovery unless, in the exercise of care after discovery of plaintiff's peril, defendant's employees could have avoided the injury, or their action was wanton and reckless.

McFarland, J., dissenting.

*See preceding case and foot-note.

Lee v. Market St. Ry. Co

In banc. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by W. M. Lee against the Market Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. F. Dunn and G. W. Baker (C. Michener, of counsel), for appellant.

Tirey L. Ford and Wm. M. Abbott, for respondent.

HENSHAW, J. This action was brought to recover damages for personal injuries sustained by plaintiff. A verdict was given in his favor, judgment in due course followed, and from that judgment, and from the order denying defendant a new trial, it appeals.

Upon the evening of September 8, 1897, plaintiff attempted to cross Kearny street, in the block between Jackson and Washington streets. While upon the track of the street railroad he was struck by an electric car approaching from Washington street, and sustained the injuries complained of, the most serious of which was a crushed foot, necessitating amputation. Although the accident occurred in the evening, the street was brilliantly lighted, and objects were plainly discernible. The car in question could have been seen, and was seen, from a distance of more than 100 feet from the place of the accident. It must be taken as proved to the satisfaction of the jury that the car was moving at an unusual rate of speed, and was sounding no gong or alarm bell. But it is strenuously argued by appellant that, conceding it to have been negligent in its operation of the car, none the less the plaintiff himself was guilty of contributory negligence barring his right of recovery. Upon this, plaintiff's own testimony is that, having been standing upon the curbstone, he looked up and down the street before he ventured the crossing, and he further testifies: "All that I know about the accident is that I was struck, and my foot was mangled. I know that the car was right on me, and I know that some man hollered in the car. I do not know where the man was who hollered at me. I suppose he was in the car. The sound was right at me when I heard it." That a man, under these circumstances, should thus heedlessly cross a public street in the middle of a block, and know nothing of the approach of a street car until the moment when it struck him, is a demonstration of carelessness and negligence so complete as to require no comment. Were this the whole of the matter, it would be clear that by his own conduct plaintiff had forfeited his right to a recovery. But there is a further principle firmly established in this state,—that one having an opportunity by the exercise of proper care to avoid injuring another must do so notwithstanding the latter has placed himself in a situation of danger by his own negligence (*Fox v. Railway Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216); or, as the principle was stated in another form in *Esrey v. Southern Pac. Co.*, 103 Cal. 541,

37 Pac. 500: "He who last has a clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so;" and as Beach well puts it (Contrib. Neg. § 50): "The real issue is not whose negligence came first or last, but whose negligence, however it came, was the proximate cause." The motorman testified that he was some 14 feet from the place of the accident when he discovered the plaintiff approaching the track. He did not then think that the man would attempt to make the crossing. Witness was standing with the brake in one hand and the bell strap in the other, and, as he came nearer, saw that the man was about to step upon the track. "I jerked the bell down and the brake at the same time, and, as I jerked the bell down, I hollered, 'Look out,' and I reached over for the reverse. As I got hold of the reverse, I just gave the brake, also, a little slack, to let the wheels slip back when I put the reverse into it. By the time I got the reverse and brake on, he was within two feet of the front of the car. I was going about six and a half miles an hour. I did everything that was possible to do to avoid the accident." But against this testimony was that introduced by the plaintiff's witnesses that the car was coming at a high and unusual rate of speed; that the attention of the motorman was directed to the plaintiff by a passenger upon the car, and that when so directed he did not attempt to stop his car, but satisfied himself with shouting, "Look out," or, "Get out of the way;" that the speed of the car was not promptly checked upon discovery of the perilous situation of plaintiff. Here, then, was enough to warrant the submission to the jury of the question whether or not the defendant exercised ordinary care after discovery of plaintiff's situation of peril. If it did not, then, notwithstanding the negligence of plaintiff, it was liable. The verdict of the jury is a finding to the effect that they did not believe that defendant's employees exercised proper care after discovery of plaintiff's situation.

The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; VAN DYKE, J.; HARRISON, J.

GAROUTTE, J. I concur in the judgment.

GULF, C. & S. F. RY. CO. v. MATTHEWS *et al.*

(Court of Civil Appeals of Texas, Jan. 25, 1902.)

[66 S. W. Rep. 588.]

Accident on Track—Evidence as to Effect of Train Striking Person While Standing.

Upon the issue of whether a person run over by a railway train was standing or walking on the track or lying on it when struck,

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evidence that a train striking a man standing on the track would throw him off, and would not run over him unless he was lying down, was relevant and material.

Same—Same—Expert Testimony.

The question of whether a train, on striking a man standing or walking on the track, would throw him off or run over him, and whether or not it would be more apt to run over him if he were lying on the track, is peculiarly within the knowledge of locomotive engineers and other persons familiar with such accidents, and hence is a proper subject for expert testimony.

Expert Testimony.

The objection that the proper predicate was not laid for expert testimony, if not urged when the testimony was offered, need not be considered on appeal.

Liability for Injuries Caused by Violation of Ordinance Requiring Signals to Be Given as Affected by Failure to Enforce Ordinance.

Where an ordinance made it a misdemeanor to run trains in any part of a city at greater than a certain speed without continually ringing the bell, neglect of the municipal authorities to enforce such ordinance in a part of the city did not excuse a violation there, so as to relieve a railroad company from liability for injuries caused by a violation of the ordinance.

Negligence—Violation of Ordinance Requiring Signals to Be Given.*

Violation of the ordinance is negligence entitling a party injured thereby to recover.

Same—Same.

The fact that a party injured did not know of the ordinance does not affect the railroad company's liability.

Same—Same—Licensees.†

Where a portion of a railroad track was commonly used as a footway to the knowledge of the company, a person so using it is rightfully upon the track, and entitled to the same benefit from an ordinance prohibiting the rapid running of trains as a person at a crossing.

Same—Application and Reasonableness of Ordinance—Evidence.

On the issue of whether or not an ordinance prohibiting the running of trains at more than a certain rate of speed anywhere in the city limits applied to a certain part of the city, evidence as to how trains were customarily operated at that place, and the cost and practicability of operating them there in the manner required by the ordinance, and that the ordinance was unreasonable, was not admissible.

Right to Walk on Track.

Though it was made a misdemeanor by ordinance to trespass on the premises of another without his consent a person walking on part of a railroad track habitually used as a footway to the knowledge of the railroad company, not being a trespasser, was not guilty of a misdemeanor.

Contributory Negligence—Intoxication.

In an action against a railroad company for negligently causing death, where defendant claimed that deceased was intoxicated at the time, a charge requiring a finding for defendant if deceased was intoxicated, without regard to whether his intoxication contributed to the accident, was properly refused.

Misconduct of Juror.

Where the brother of plaintiff, who was looking after the case for her, met a juror whom he intimately knew, and the juror bought

*See *Knopf v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 172, and foot-note, 173.

†See *Cincinnati, H. & D. R. Co. v. Aller* (Ohio), 21 Am. & Eng. R. Cas., N. S., 304, and extensive note, 309.

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drinks and cigars for both, while the brother paid for their dinners which they ate together, such action was sufficient cause for setting aside a verdict in plaintiff's favor, though both parties testified that the case was not mentioned.

Error from district court, Grayson county; Rice Maxey, Judge.

Action by Maggie Matthews and others against the Gulf, Colorado & Santa Fe Railway Company. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

J. W. Terry, Chas. K. Lee, and Culvert & Hay, for plaintiff in error.

Wolfe, Hare & Semple, for defendants in error.

TEMPLETON, J. The defendants in error, who are the wife and minor children of J. L. Matthews, deceased, brought this suit to recover the damages sustained by them on account of his death, which, it was alleged, was occasioned by the negligence of the plaintiff in error. On a trial before a jury they obtained judgment for \$10,000.

A little after 6 o'clock in the morning of May 8, 1899, a north-bound freight train of the plaintiff in error ran over a man, who afterwards proved to be the said J. L. Matthews. The man was dead when found a few minutes later. There were no eyewitnesses to the accident except the engineer and fireman of the train. The accident occurred within the limits of the city of Ft. Worth, and near the northern boundary thereof. Matthews had been doing some grading on the road of plaintiff in error near Cleburne, and owned a grading outfit, consisting of the necessary teams and tools. He quit work, and, leaving his outfit at Cleburne, went to Ft. Worth on the day before his death, in company with one Turner. He went there expecting to get work at a gravel pit, or from the Texas & Pacific Railway Company. One of his employees was to bring the grading outfit across the country to Ft. Worth, and meet Matthews at a certain point on Main street, about 3 o'clock p. m. on May 8th. Matthews and Turner separated about 10 o'clock p. m. on May 7th at a lodging house on Main street, where Matthews was stopping, agreeing to meet at 7 o'clock next morning on Front street, near the Union Depot, in the southern part of the city, for the purpose of going to look for a camping place for the grading outfit. It appears from the testimony of a clerk of the lodging house that some time between 10 and 11 o'clock that night Matthews, after engaging a bed, left the lodging house, saying that he would be back in about an hour. He did not return, however, and his whereabouts from that time until the accident occurred were not shown. He was somewhat intoxicated when he left the lodging house, the evidence being uncertain as to what extent. He was shown to be a man who sometimes drank to excess. It was the theory of the defendants in error that Matthews had learned of a noted and generally used camping

ground, which was located a short distance north of the place where the accident occurred, and that he was on his way to look at the same, and that while he was walking along the track he was overtaken and run down by the train. It was shown by the testimony of one witness that a man answering the general description of Matthews passed down the track a little ahead of the train. It was the theory of the plaintiff in error that Matthews was drunk, and that while going about the city in that condition he became lost, and wandered upon the track, and fell or lay down, or was assaulted and robbed, and his body left there by his assailant. The engineer and fireman testified that they were keeping a sharp lookout, and saw and ran over an object lying on the track, but did not know that it was a man until afterwards, though they thought it might be a man. The weather was very foggy that morning, and they testified that on account of the fog they did not discover the object until they were almost upon it, and could not be sure what it was. There was an attempt made to impeach the engineer by testimony showing that he had made statements which conflicted in some respects with the testimony delivered by him on the trial. There was evidence to the effect that the body was warm when found, and that fresh blood was flowing it. The court instructed the jury to find for the defendant if they believed that Matthews was lying on the track when he was struck by the train, and authorized a recovery by the plaintiffs only in the event that the jury believed that Matthews was struck and killed while walking along the track.

The plaintiff in error offered to prove by one Gumpert that he was a locomotive engineer of 13 years' experience, and had frequently run over animals when the same were walking, standing, and lying on the track, and had run over persons when they were walking and lying on the track; that his experience as an engineer was that in 99 cases out of 100 a person or animal walking or standing on the track would not be run over, but that the cow-catcher would throw them off the track; that this is particularly true as to a train running 25 or 30 miles an hour, or at a rapid rate of speed; that, in his opinion, the chances are 99 in 100 that, if the train ran over a man on the track, he was lying down on it when he was struck. The evidence in this case showed conclusively that Matthews was run over on the track, and that the train was running at a speed of 25 or 30 miles per hour when it struck him. The testimony of Gumpert was objected to on the grounds that it was immaterial and irrelevant, and called for his opinion on a question upon which he was not entitled to express an opinion, the question not being a proper one for expert testimony. The objection was sustained, and the evidence excluded. The plaintiff in error offered to make the same proof by six other experienced engineers, but the same objections were made to their evidence with like result.

It is clear that the proposed testimony was neither immaterial nor irrelevant. The remaining objection that the question was not a proper one for expert testimony requires more serious consideration. The general rule relating to the admissibility of such evidence is thus stated by Lawson on Expert Evidence: "Every employment which has a particular class devoted to its pursuit is an art or trade, and persons instructed therein by study or experience may give their opinion." This language was quoted with approval in *Railway Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742, and it was there held that the business of railroading comes sufficiently within the rule to make the opinions of those engaged in it admissible. This, of course, does not mean that an experienced railroad man may give his opinion as to any and every matter connected with the business. The general rule just stated is qualified by another rule, which limits the testimony of the expert to such matters as require technical knowledge to understand. Lawson, Exp. Ev. rule 37. If the uninitiated and inexperienced person can reach a satisfactory conclusion upon the point in question when the facts upon which the conclusion is to be based have been established, then the opinion of the expert is not admissible. But, if the conclusion can be drawn only by one having special knowledge or experience in that line of business, the opinion of the specialist is admissible. In this case one of the vital questions in issue was whether, when Matthews was struck by the train, he was standing up or lying down. The defendant proved by two witnesses that he was lying down. The plaintiffs introduced evidence tending to show that he was standing up, and attempted to impeach one of the defendant's witnesses. It was conclusively shown that the entire train passed over the dead man. If, as contended by the plaintiffs, the testimony introduced by the defendant on this issue was false, then the position of Matthews at the time he was struck was unexplained, except by circumstances. Thereupon the question arose whether, if Matthews was standing up when struck, he would have been thrown from the track, and not run over. The defendant offered to prove by engineers that, in their opinion, based upon long experience, a man or animal struck while standing on the track would almost invariably be thrown from the track, and not run over. The objection of the plaintiffs was, in effect, that the jurors were as competent as the engineers to decide whether such was the fact. This objection carries with it the idea that the effect of a train striking a person or animal standing or lying on the track is a matter of common knowledge, and that the special knowledge and experience of the engineer is not needed to solve the question. It seems absolutely certain that this proposition is unsound. Suppose the object struck is standing on the track. Will it be thrown directly off? Will it be thrown forward, and fall on the track? Will it be thrown upward and fall on the cow-catcher, and, if

so, will it fall or be thrown off in front or to one side? One not learned in the sciences involving the action of physical forces and not experienced in watching the result of such action might speculate upon these questions, but the difficulty of his reaching a satisfactory conclusion upon them is apparent. On the other hand, the experienced engineer, who has witnessed many such events, is in a position to speak with some degree of authority in these respects. If he is qualified to speak, and the jury believes that his opinion is fairly and truly given, his testimony would aid them in arriving at a conclusion. In view of the evidence in this case, we think that the testimony of the engineers should have been admitted, and that it was material error to exclude it. This conclusion is clearly in accord with the rules of law governing the admission of such evidence, and is in line with the decision in *Cooper v. Railroad Co.*, 44 Iowa, 141, where it was held that an engineer might give his opinion as to what would be the effect of a backing train striking a cow standing on the track.

The defendants in error suggest in their brief that the proper predicate was not laid. This objection was not urged when the testimony was offered, and we are not called upon to consider it. But, even had the objection been interposed at the proper time, it is by no means clear that it would have been well taken. According to the theory of the defendants in error, the position of Matthews at the time he was struck was wholly unexplained, except that it was their contention that he was either walking or standing on the track. The hypothetical questions asked were, therefore, necessarily general in their nature, and defendants in error could not complain that they were framed to meet the case presented by their contention. A substantial similarity of conditions should, however, be shown by the predicate testimony.

The plaintiff in error had fenced its track at the place of the accident, the fence extending north beyond the city limits. The train had passed the last crossing within the city. A witness testified that the fence was broken, so that people could and did pass through. How long the fence had been in that condition, and whether the company knew that fact, was not shown. The company had issued notices warning the public to keep off its tracks and grounds, which notices had been posted at various places along its line of road. The nearest place to the scene of the accident where such notice was posted was at the depot in the southern part of the city, about $1\frac{1}{2}$ or 2 miles from the point where Matthews was struck. There was testimony to the effect that the track at the place of the accident had been commonly and habitually used by the public for a long time, to such extent, and so openly and notoriously, that the company either knew or should have known of such use. It was not shown that the company actually consented to the use of its track, but the evidence suggests the theory that it acquiesced therein. It was made

a misdemeanor by the ordinances of the city of Ft. Worth to run a train within the limits of the city at a rate of speed greater than six miles per hour, or without continually ringing the bell. The evidence is conclusive that the train was run at a much greater rate of speed than six miles per hour, and was conflicting as to whether the bell was ringing. The court instructed the jury that if the track at the point of the accident was commonly and habitually used by the public as a footway, and the company knew and acquiesced in such use, and if Matthews was struck and killed while walking on the track, and if the train was run in violation of the ordinances of the city relating to the matter of speed or the ringing of the bell, and if the excessive speed or the failure to ring the bell was the cause of the accident, then the plaintiffs were entitled to recover. The plaintiff in error objects to this charge on the ground that under the facts shown the ordinances were not applicable to such places as that where the accident occurred, and that in respect to such places they were unreasonable and void. It also offered testimony, which was excluded, for the purpose of showing that the ordinances had never been enforced at the place of the accident, and that the officers of the law who were charged with the enforcement thereof had recognized the right of the plaintiff in error to disregard the same. We are of opinion that the objections of the plaintiff in error are not well taken. As criminal statutes, the ordinances were operative in all parts of the city, and the fact, if it be a fact, that the city officers neglected to enforce them, or even connived at the violation thereof, would not excuse any infringement of the same. The object of the ordinances is manifest. In cities like Ft. Worth it is dangerous to human life to operate railway trains at a rapid rate of speed, or without proper warning signals, and the ordinances were adopted to protect the public against the danger. Any member of the public lawfully upon the track of a railway company within the city limits would be entitled to the benefit of the ordinances, and as to such person a violation of such ordinances would be negligence on the part of the company. Whether the company would owe a duty to a trespasser not to violate the ordinances is a question which is not before us for decision. If, as submitted in the charge under consideration, the track of the plaintiff in error at the point of the accident was commonly and habitually used by the public as a footway with the knowledge and acquiescence of the company, then Matthews was rightfully upon the track, and the same reason existed why the ordinances should be applied at such place as at crossings down town. Neither would the fact, if it was a fact, that Matthews did not know of the ordinances, change the duty which the company owed to him as a member of the public to observe the laws which the city had enacted for the protection of the public. The testimony offered by plaintiff in error tending to show how trains were customarily

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operated at such places, and the cost and practicability of operating them at such places in the manner required by said ordinances, and that the ordinances were unreasonable, was not admissible on the issue here considered. If it was burdensome to plaintiff in error to comply with the ordinances at the point where the accident took place, it had voluntarily assumed the same by assenting to the use of the track at that point by the public.

It was made a misdemeanor by the ordinances of the city for any person to trespass upon the premises of another, without his consent. The plaintiff in error insists that Matthews was a trespasser because he was upon the track in violation of this ordinance. If plaintiff in error acquiesced in the use of its track at that point by the public, the ordinance would not apply, for in such case Matthews was not a trespasser.

The special charges asked by the plaintiff in error on the issue concerning the intoxication of Matthews were properly refused, as the same required a finding for the defendant if Matthews was intoxicated, without regard to whether his intoxication contributed to the accident.

For the errors indicated above, the judgment is reversed, and the cause remanded. Reversed and remanded.

ALSEVER v. MINNEAPOLIS & ST. L. R. CO.

(Supreme Court of Iowa, Jan. 23, 1902.)

[88 N. W. Rep. 841.]

Injury to Child Frightened by Blowing Off Steam—Declarations of Engineer Acting in Sport as Res Gestæ.*

A declaration of a railroad engineer, who had blown off steam and frightened a little girl so that she fell and broke her leg, that he only did it in sport, made within a minute after blowing off the steam, and as soon as the engineer could reach the point where the injured child was lying, was admissible in an action against the company, as part of the res gestæ.

Same—Liability for Wanton Act of Engineer.†

Where a railroad engineer blows off steam in order to frighten children, and a child is frightened so that it falls and breaks a leg, the company is liable; the blowing off of steam being within the scope of the engineer's employment, and the only negligence consisting in the manner and place of doing it.

Appeal from district court, Webster county; S. M. Weaver, Judge.

The defendant appeals from a judgment for damages. Affirmed.

*See *Weinkle v. Brunswick & W. R. Co.* (Ga.), 14 Am. & Eng. R. Cas., N. S., 50, and note, 57 et seq.; 5 Rap. & Mack's Dig. 463 et seq.; 11 Am. & Eng. Enc. Law (2d Ed.) 523 et seq.; 20 Cent. Dig., col. 403 et seq.

†As to the master's liability for the malicious or wanton acts of employees, see 20 Am. & Eng. Enc. Law (2d Ed.) 169 et seq.

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R. M. Wright, for appellant.

Botsford, Healy & Healy, for appellee.

LADD, C. J. The defendant's train had stopped at Burnside shortly after 12 o'clock m. May 25, 1899. Attached to the engine was a device known as the "McIntosh Blow-Off Cock," used for the purpose of cleansing the boiler of sediment by forcing water through it from the bottom at great pressure. At that time the plaintiff, then eight years old, was standing, with other children, on the side of the corncrib, about 7 feet above the ground, and some 20 feet from the engine, looking at it through an opening. In operating the blow-off cock, hot steam or spray was thrown on the crib, and possibly on plaintiff, thereby so frightening her that she fell, breaking a leg. She then moved from the crib to a pile of cobs near by. Her screams immediately brought her father, Cox, and the engineer. The father testified: "A. While I was standing near the end of the crib I saw the children at the opening on the east side, and all of a sudden I heard a terrible roar, and I turned and saw a cloud of steam coming from the engine to the crib, and in a moment I heard a cry; and I ran around from the north to the west side of the crib, and found the engineer, Mr. Taft, there, and the child was on a pile of cobs. Q. What, if anything, was said by the engineer at that time in reference as to how the accident happened? A. He says, 'I was only having a little fun with the children.' Q. What had you said to him that brought forth the remark? A. I says, 'What is the matter here?' Q. What did the engineer say, if anything, respecting the accident, and how it was caused, or what he intended to do? A. What he said was that he had no idea of hurting the children, or hurting any one (I do not know the exact words he used), or something to that effect; but, anyway, that he had no idea of hurting the children. Q. What else did he say at the same time? A. He said he had no idea of hurting the children,—just for the idea of having a little sport with them, or fun; that he was just going to have a little sport with the children. Q. Was this all said at the one time? A. Yes, sir; this was said not over a minute after I heard the noise from the engine, and the child scream. I would think it was less than a minute. I know that when the child screamed he ran right around there. We all three met there about the same time." The evidence of Cox was to the same effect. The objection interposed by defendant, that this formed no part of the *res gestæ*, was overruled. As the crib was on the depot grounds, the court held that the defendant owed no positive duty to plaintiff; and therefore this evidence was of controlling importance in determining whether the engineer, in blowing off the hot steam or spray, knew that plaintiff was in a place of danger. It will be noticed that the evidence tended to show that conversation occurred within a minute after the use of the blow-off cock, and as soon as the engineer could reach the point

where the injured child was lying, to ascertain the result of what had been done. The opening of the blow-off cock, the rush of steam and spray, the scream of the child, the question of the father, the statement of the engineer, all within a few seconds, were so immediately connected as to constitute one transaction. What forms a part of the *res gestæ* must of necessity depend on the facts of each particular case. A mere account of a past occurrence, or purely an opinion of what has happened, is to be rejected. Declarations, to be received, should derive credit, not from the declarant, but from their connection with the principal fact of which complaint is made. The rule is concisely stated thus in *Hadley v. Carter*, 8 N. H. 40: "Where declarations of an individual are so connected with his acts as to derive a degree of credit from such connection, independent of the declaration, the declaration becomes part of the transaction, and is admissible in evidence." In *Felt v. Amidon*, 43 Wis. 467-470, in quoting with approval from the case of *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36, the court said: "When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay. Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." The grounds upon which such statements have been received are generally concurred in. The difficulty has been in drawing a line with respect to lapse of time after, and the necessary connection with, the main act, so as to clearly distinguish between declarations which are admissible and those too remote and disconnected. In *Keyes v. City of Cedar Falls*, 107 Iowa, 509, 78 N. W. 227, the rule to be deduced from our decisions is said to be that "if they are near enough in point of time to the principal transaction to clearly appear to be spontaneous and unpremeditated, and free from sinister motives, and afford a reliable explanation of the principal transaction, they are admissible in evidence." See *Railway Co. v. Anderson* (Tex. Sup.) 27 Am. St. Rep. 902, note (s. c. 17 S. W. 1039); also *Wilson v. Southern Pac. Co.* (Utah) 57 Am. St. Rep. 766, note (s. c. 44 Pac. 1040), where the true rule is accurately and

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comprehensively stated thus: "All declarations or exclamations uttered by the parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, or so soon thereafter as to exclude the presumption that they are the result of premeditation or design, and which are calculated to throw light on the motives and intention of the parties, are admissible in evidence as part of the *res gestæ*." So immediately connected was the engineer's remark as to how it all happened with what preceded, that it was an explanatory exclamation, not merely an excuse or account of what had been done. The inquiry to which it was a response did not necessarily interrupt the connection. Indeed, the authorities put little stress on the circumstance. It is proper to be considered, however, in ascertaining the connection with the main fact, but not controlling. Neither can it make any difference that the statement was made by an employee or agent, rather than the principal or injured person. Declarations are received, as already pointed out, not on the credit or relation of the declarant, but because forming a part of the transaction; and it is immaterial by whom, if by some person whose conduct or condition, about which the statement is made, can be proven. *Coll v. Transit Co. (Pa.)* 37 Atl. 89. Nor is the fact that the statement was in the nature of an excuse enough alone to warrant its exclusion. The books indicate that many, if not most, of the declarations admitted as part of the *res gestæ*, are of this character. If in the nature of an excuse, however, the fact is important in determining whether the statement was spontaneous and unpremeditated, or a mere opinion or conclusion based on a completed transaction. The declarations, if made by the engineer, were but the natural expressions of one so engaged, upon the discovery of the result of his diversion, and were so immediately connected in point of time and circumstance with what he had done as to exclude the probability of meditation, and, as we think, were properly received in evidence as a part of the *res gestæ*. As sustaining our conclusion, see *Fish v. Railway Co.*, 96 Iowa, 702, 65 N. W. 995; *Hermes v. Railway Co.*, 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; *Durkee v. Railway Co. (Cal.)* 9 Pac. 99; *Railway Co. v. Elliott (Neb.)* 74 N. W. 628. Undoubtedly decisions are to be found tending to a contrary conclusion, but, in view of the difficulty courts have experienced in determining what may properly be proven as included within the *res gestæ*, this is not at all surprising. Some mistakes, under such circumstances, were inevitable, and the books are not wanting in opinions going, as we think, too far in both directions.

2. The engineer testified that ordinarily he operated the blow-off cock 10 times a day, and that in doing so on this

occasion he did not notice the children. The defendant requested the following instruction, which was refused: "If you find from the evidence that the defendant's servants were not using the blow-off cock for the purpose of cleansing the boiler of defendant's engine, but solely for a purpose of their own,—for their own amusement, and for the purpose of frightening the plaintiff and the other children with her,—the plaintiff cannot recover in this action." The engineer was in charge of the engine, and had control of the blow-off cock. How often and when to make use of it was necessarily left to his judgment. All that was exacted of him was that in doing so he exercise ordinary care. In blowing off the steam he was acting within the scope of his employment. The negligence consisted in the manner and place of doing it. There was no departure from his employment,—merely a failure to exercise care in doing what he was authorized to do. Says Prof. Wharton: "It may have contravened the master's purposes or directions; but a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects than can a master who puts machinery in motion escape liability, on the ground of good intentions, from injuries occurring from defects of machinery. Out of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to the master; but within that orbit they are so imputable, whatever the master may have meant." Whart. Neg. § 160. In *Railway Co. v. Shields* (Ohio) 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840, an employee placed torpedoes, used for signals, on the track in front of the wheels of the caboose in which lady passengers were riding, with the purpose of frightening them by their explosion when being passed over. One of them was afterwards found on the track by some boys, who caused it to explode by hitting it, and injured one of them. In the course of the opinion, affirming the company's liability, the court said: "It is necessary in this and all similar cases to distinguish between the departure of a servant from the employment of the master, and his departure from or neglect of a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside of the employment of the master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master. Otherwise the duty required of the master in respect to the custody of such

instruments employed in his business may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of neglect of duty." In *Andrews v. Railway Co.*, 77 Iowa, 669, 42 N. W. 513, a fireman had been left to watch the engine, and while doing so unnecessarily blew off the steam; and an instruction that if, "while so in charge or while employed in the discharge of his duties as fireman, he negligently or willfully let off steam, and thereby frightened plaintiff's horses, and injured plaintiff, the defendant was liable," was approved. See, also, *Railway Co. v. Boettcher* (Ind.) 28 N. E. 551; *Brendle v. Spencer* (N. C.) 34 S. E. 634; *Cobb v. Railway Co.* (S. C.) 15 S. E. 879; *Railroad Co. v. Dickson*, 63 Ill. 152, 14 Am. Rep. 114. In *Railroad Co. v. Harmon*, 47 Ill. 299, 95 Am. Dec. 489, the plaintiff checked his team to allow the locomotive to pass, but, instead, it stopped; and, though the engineer noticed the horses were afraid, he unnecessarily and wantonly let off steam. It was contended in that case, as in this, that the act was wanton and willful and outside of his authority, and that the company was not liable. Answering this contention, the court said: "He was their servant,—was engaged in the performance of the duty assigned to him; and if, while so engaged, he used the engine put into his possession and under his control to accomplish the wanton or willful act complained of, why should not the company be held liable? It is said that he was not employed for the purpose, nor directed to perform the act; and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants. * * * But when employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskillful manner or so negligently as to occasion injury to another, or even if while so engaged he willfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages. They should not be permitted to say, 'It is true he was an agent, was authorized by us to have possession of our engines, was engaged in carrying on our business, and while so engaged he willfully perverted the instruments which we placed in his hands to something more than that designed or authorized, and therefore we should not be liable for the injury thus inflicted.' In this case, so far as the record discloses, the engineer was properly engaged in the use of the machinery of the company; and it can make no difference whether the escape of steam was negligently permitted or willfully done by the engineer, any more than if he had willfully run his engine against appellee's wagon and team, and this produced the injury. The question whether or not it was negligently done can, we think, make no difference in the results." If the company may be held liable for an injury caused by the engi-

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neer blowing off steam or a whistle to purposely frighten a team, as many authorities hold, it is not perceived on what principle such liability shall be denied when this is done to frighten children. See 2 Thomp. Neg. § 1910 et seq. We think the true test that stated by Judge Cooley in his work on Torts (page 536): "The test of the master's liability is not the motive of the servant, but whether that which he did was something which his employer contemplated, and something which, if he could do it lawfully, he might do in the employer's name." It was part of the engineer's duty to use this blow-off. For all the record discloses, he may then have been operating it to cleanse the boiler. There is no evidence to the contrary. Whether incidentally to cleansing it he engaged in the diversion of frightening the children, or blew off the steam or spray for that express purpose, however, we think, can make no difference. The company had placed in his charge an instrumentality requiring care in its operation and management. He was doing precisely what the company contemplated he should do when it employed him, i. e. operating the blow-off cock. When this was to be done, and how, as said, was left to his discretion, the use of which was also contemplated in his employment; and the company was as responsible for a mistake or willful perversion of judgment in its operation, if within the compass of what he was to do, when amounting to negligence, as for his negligence in doing that which may be conceded to have been necessary. *Rounds v. Railway Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Cooley, Torts*, p. 534. This is well illustrated by the case of *Cobb v. Railway Co.*, 37 S. C. 194, 15 S. E. 878, where the company was declared liable for the misconduct of the engineer in willfully or wantonly blowing off steam so as to scare a horse and cause it to run away, but not for the misconduct of the trainmen contributory thereto, by shouting. The engineer was doing that which he might, but for the proximity of the horse, lawfully do within the scope of his employment. Trainmen were under no circumstances engaged to do what they did. The one thing was done within the master's business; the other, without. And on this principle *Kincade v. Railway Co.*, 107 Iowa, 682, 78 N. W. 698, and *Marion v. Railway Co.*, 59 Iowa, 430, 13 N. W. 415, 44 Am. Rep. 687, are to be distinguished from the case at bar. *Stephenson v. Southern Pac. Co. (Cal.)* 29 Pac. 234, relied on by appellant, is not in harmony with the authorities heretofore cited, and does not meet our approval.

We think the instruction properly refused, and that the judgment should be affirmed.

WEAVER, J., took no part.

DADY *et al.* v. GEORGIA & A. RY. *et al.*
(Circuit Court, E. D. Georgia, S. D., January, 27, 1900.)

[112 Fed. Rep. 838.]

Courts—Several Actions—Jurisdiction.

Where a railway system, composed of several companies, with continuous lines, extending through several states, is sued by the same stockholder or his privies in separate proceedings in different judicial districts of the United States, to defeat consolidation and break up the system, a proper regard for the dignity and authority of the United States courts demands that the controversy should be disposed of in the first United States court having sufficient jurisdiction of the parties and cause of action.

Same.

In the matter under consideration it appears that the complainant and those acting with him have presented bills in several circuit courts of the United States along the line of the respondent's system, seeking to take the chances of a possible difference of judicial opinion, when the rights in controversy could have been properly determined in the circuit court of the United States for the Fourth circuit, sitting in the Eastern district of Virginia. The evil of this practice discussed.

Same—Temporary Injunction.

There are cases where each court must exercise its independent jurisdiction and render its independent decree, but it should be a very strong case which would justify a court of the United States to grant a temporary injunction when given sufficiently to understand that another such court, with concurrent jurisdiction, upon a plenary bill, has full charge of the same controversy, between the same parties or their privies, or has refused such an injunction.

Railroads—Consolidation.

Under the general railway law of Georgia, proper corporate action for the purpose of merger and consolidation of railroads is a majority vote of the stock of the corporation. Code Ga. § 2179; *Alexander v. Railroad Co.*, 33 S. E. 866, 108 Ga. 151.

Same—Voting Trust—Merger.

Where an officer of a corporation is also a member of a voting trust, a merger or consolidation brought about through his vote is not necessarily void; but the burden is on the interest for which he acts to show that the transaction was free from any taint of wrongdoing, bona fide, lawful, and for a fair consideration to the parties at interest.

Same—Creation of Monopoly.*

Where separate lines of railway start out at a right angle from a seaport, transport freight and passengers from widely-separated sections of two states, and no point on either road can be reached in any reasonable time by a passenger starting out on the other, such consolidation does not tend to defeat competition and create monopoly merely because both lines cross two shallow rivers, on which steamboats carrying freight and passengers occasionally ply. This is especially true since the streams in question are also spanned by three other strong railway systems.

Same—Injunction.

The injunction sought in this case refused.

(Syllabus by the Court.)

Joseph M. Terrell, Atty. Gen. of Georgia, Marion Erwin, and Morris Brandon, for complainants.

Walter G. Charlton, John A. Henderson, and Boykin Wright, for respondents.

*As to when railroads are competing, see generally, 6 Rap. & Mack's Dig. 917 et seq.

ILLINOIS CENT. R. CO. v. TURNER.*(Supreme Court of Illinois, Feb. 21, 1902.)*

[62 N. E. Rep. 798.]

Construction—Damages—Limitations as Affected by Length of Time Portion of Road Has Been Constructed.

Where action is for damages to real estate from extension of railroad and operation of the extension, length of time the other part had been constructed does not affect the question of limitation.

Same—Elements of Damages—Instructions.

Where all the inconveniences proved in a case are proper elements of damage, there is no error in instructing that, in determining whether plaintiff's property was lessened in value by construction and operation of the railroad, consideration may be had of injury, if any, to his property from inconvenience occasioned by operation of the road, and of such damage as the evidence may show, if any, is reasonably probable to ensue from such operation.

Same—Measure of Damages.

The measure of damages for land not taken, but depreciated in value by construction and operation of railroad, is the difference in market value of the land before and after the construction.

Same—Same—Instructions.

Instruction that if defendant constructed the railroad and is operating it as described in the declaration, and by reason of such construction and operation plaintiff's property is injured, he is entitled to recover such sum as from all the evidence he is shown to have sustained thereby, does not assume that the mere construction and operation, without any proof of items of damages alleged in the declaration, is a damage.

Appeal from appellate court, Fourth district.

Action by James Turner against the Illinois Central Railroad Company. From judgment of appellate court (97 Ill. App. 219) affirming judgment for plaintiff, defendant appeals. Affirmed.

Wm. H. Green and J. M. Dickinson, for appellant.

James H. Martin, for appellee.

HAND, J. This is an action on the case brought by the appellee against the appellant, in the circuit court of Jackson county, to recover damages to certain real estate situated in the city of Murphysboro, claimed to have been caused by the construction and operation of appellant's railroad through said city in the vicinity of said property. The jury returned a verdict in favor of the appellee for \$1,500, upon which verdict, after overruling a motion for a new trial, the court rendered judgment, which judgment has been affirmed by the appellate court for the Fourth district, and a further appeal has been prosecuted to this court.

The declaration consisted of one count, and, in substance, is as follows: That on the 1st day of May, 1898, plaintiff was the owner and in possession of the west part of lot 4, in block 6, in the city of Murphysboro; that there is located thereon a two-story brick building, which faces south on Walnut street; that Thirteenth street joins the premises on the west; that

Walnut street and Thirteenth street are constantly in use for travel by the public; that the defendant is operating its railroad with cars and engines south from the north line of Walnut street at the crossing of Thirteenth street, and within 10 feet of the building located on said premises; that a passenger and freight depot of the defendant is located immediately north of the said premises, and within 200 feet of the crossing of Walnut and Thirteenth streets; that the defendant's cars and engines daily stop and remain over and across said Walnut street for a long space of time, and thereby hinder and delay the passage of persons and teams on and along said street; that immediately south of said premises there is a sharp curve in said railroad; that great power is necessarily employed in passing north on said road; that defendant's trains, in approaching and passing said premises from the south, emit and throw out great volumes of smoke, dust, and cinders into and upon said premises, and likewise create and cause loud and ominous noises, and cause the ground and buildings thereon to shake and vibrate; that said railroad is of a permanent nature; and that the plaintiff is greatly damaged, etc. The pleas filed were the general issue, and that of the five-years statute of limitations.

The evidence introduced on behalf of appellee tended to show that he is the owner of certain premises situated at the intersection of Walnut and Thirteenth streets, in the city of Murphysboro; that the same are improved with a two-story brick building, facing the south; that Walnut street runs east and west, and is crossed by Thirteenth street at right angles, the property of appellee being located upon the north side of Walnut street and upon the east side of Thirteenth street; that many years ago a railroad was built from the north along Thirteenth street, within a few feet of the west line of appellee's property, to the north line of Walnut street; that about two years prior to the commencement of this suit appellant constructed said railroad south from the north line of Walnut street to and beyond the city limits; that immediately south of Walnut street the road curves to the east, at which point there is a considerable grade descending toward the south, and that in passing said premises from the south the engines and trains of appellant emit and throw upon appellee's property large quantities of smoke, dust, and cinders, and cause the ground and said building to shake and vibrate; and that the property of appellee has been greatly damaged by the construction and operation of said railroad south from the north line of Walnut street.

A number of errors have been assigned, but only two which we can consider are insisted upon in this court: First, that the court erred in refusing to give a peremptory instruction to the jury to find for the defendant; second, that the court erred in giving improper instructions for the plaintiff.

In this case the claim for damages arises from the extension

and operation of the road south of the north line of Walnut street, which line was constructed by the appellant within two years prior to the time suit was brought, and is a new line of railroad. This case therefore differs from the cases of *Railway Co. v. Smith*, 111 Ill. 363, and *Kotz v. Railroad Co.*, 188 Ill. 578, 59 N. E. 240, relied upon by appellant, in which cases the damages sought to be recovered were for the increased use of said companies' rights of way by placing new lines of track thereon and by elevating the roadbed, respectively. While the city had the right to grant to the railroad company the use of its streets for railroad purposes, it could not grant to it the right to throw dust, cinders, or smoke upon the property of appellee or to injure the same in any other manner. In view of the evidence, the court did not err in declining to give to the jury a peremptory instruction to find for the defendant.

The appellant complains that the court erred in giving to the jury the second, third, and fourth instructions submitted on behalf of the plaintiff. The second instruction informed the jury that, in determining whether the plaintiff's property is lessened in value by reason of the construction and operation of said railroad, they might consider the injury to the plaintiff's property, if any is proven, arising from the inconvenience actually brought about and occasioned by the operation of said railroad, although such damages might not be susceptible of definite ascertainment, and that they might consider, generally, such damage as the evidence may show, if any, is reasonably probable to ensue from the operation of said road. This instruction was substantially given in *Railroad Co. v. Scott*, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330, and approved. It is held that noise may be an element of injury for which damages may be awarded (*Railway Co. v. Darke*, 148 Ill. 226, 35 N. E. 750); that the obstruction by trains of a street upon which land abuts is an element of damage (*Mix v. Railway Co.*, 67 Ill. 319); and that it is proper to prove as an element of damages the special disadvantages and annoyances which interfere with the full enjoyment, use, and benefit of property by the operation of a railroad, such as throwing smoke, cinders, and ashes upon the premises, and the noise and vibrations caused by passing trains (*Railway Co. v. Leah*, 152 Ill. 249, 38 N. E. 556; *Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341). While all inconveniences are not proper elements of damage, the inconveniences proven in this case were, and we do not think the jury were misled by the instruction.

The fourth instruction informed the jury that the true measure of compensation, where no land is actually taken, is the difference between what the whole property could be sold for unaffected by the improvement and what it would sell for as affected thereby. We have repeatedly held, if lands not taken will be depreciated in value by the construction and

operation of a railroad, the measure of damages is the difference in their market value before the construction of the road and after its construction. *Railroad Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Railway Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207, 9 Am. St. Rep. 539. The instruction was substantially correct.

The third instruction is as follows: "If you shall believe, from the evidence in this case, that the defendant constructed the extension of its railroad track near to the plaintiff's property within the last five years prior to bringing this suit, and is operating said railroad as described in plaintiff's declaration, and that plaintiff is the owner in fee of said premises, and that by reason of such extension, construction, and operation by the defendant plaintiff's property described in his declaration is diminished thereby in its market value, then plaintiff has a right to recover, and your verdict should be for him in such sum as, from all the evidence, he is shown to have sustained, if any, by reason thereby." The criticism made upon this instruction is that it assumes that the mere extension of the railroad and its operation, without any proof of the specific items of damage set out in the declaration, are a damage to plaintiff. We do not think the instruction subject to the criticism. It confines the jury to the evidence, and informs them if they believe therefrom the plaintiff's property is diminished in its market value, by reason of the extension, construction, and operation of said road, their verdict should be for the plaintiff for such amount as all the evidence shows him to have sustained.

Six pages of appellant's brief are taken up with a discussion of the evidence to show that the damages are excessive. That question was conclusively settled by the judgment of the appellate court, and is not open to review in this court.

We find no reversible error in this record. The judgment of the appellate court will be affirmed. Judgment affirmed.

PEARL v. OMAHA & ST. L. R. CO.

(*Supreme Court of Iowa, Feb. 3, 1902.*)

[88 N. W. Rep. 1078.]

Death of Brakeman—Negligence—Evidence of Custom.

Where, in an action against a railroad company for negligence resulting in the death of a brakeman, the particular negligence charged was the failure of the conductor of the freight train to set the brakes and stop the detached portion of the train, which ran forward, causing the accident, evidence that it was customary for conductors of such trains to set the brakes on the caboose and stop the detached portions of their trains under such circumstances was proper.

Same—Witnesses—Hypothetical Questions.

Where, in an action against a railroad company for neglect of a freight conductor to set the caboose brakes and stop the detached portion of his train while a car was being set out, whereby a brakeman

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was killed, a witness has testified to the customary way of setting cars out of a train under such circumstances, his remark, to a hypothetical question, that it described a condition that is unusual, that he did not remember any like that given, and that he had never been employed on this particular conductor's train, is not ground for excluding his testimony, but goes only to its weight.

Same—Witnesses—Impeachment.

In an action against a railroad company for the death of an employee, plaintiff's witness claimed on cross-examination that he had been discharged from defendant's employ because he left a switch unlocked. In a deposition taken at plaintiff's instance, in answer to a question whether he left the switch open, he said that he claimed to have left the switch unlocked, and not open. On the trial he insisted that his answer in the deposition was merely, "No, sir": *held*, that the deposition was properly excluded as impeaching evidence, because the witness' insistence at the trial did not materially differ from the answer in the deposition.

Same—Same—Same.*

The deposition was also properly excluded because it was an attempt to impeach on an immaterial matter.

Same—Negligence—Evidence of Rules of Company.

In an action against a railroad company for negligence of a conductor, whereby a brakeman was killed, it was not error to receive in evidence a rule of defendant requiring conductors to take every precaution for the protection of their trains.

Appeal—Review—Presumptions.

Where the contents of documents offered in evidence are not set out in the abstract, the ruling of the court excluding them will be presumed correct.

Same—Wife's Testimony That Husband Was Industrious.

In an action by a surviving wife against a railroad company for the negligent killing of her husband, her testimony that he was industrious is competent testimony as to a fact, and not the expression of an opinion.

Same—Wife's Testimony as to Husband's Earnings.

In an action by a surviving wife against a railroad company for the negligent killing of her husband, her testimony as to his earnings and expenses is competent.

Same—Evidence—Life Tables—Objections.

An objection to the admission of the expectancy tables offered in an action to recover for the death of a railroad employee, that the language of their offer was "to show the expectancy of the life of deceased," rather than "as tending to show," is too technical to be sustained.

Same—Same—Same.*

The Carlisle tables of life expectancy, as contained in the *Encyclopædia Britannica*, are properly admitted in an action to recover for negligently causing death, without preliminary proof.

Same—Same—Same.

The American Experience tables of life expectancy, contained in a life insurance manual, and shown to be in general use by insurance men throughout the state, and accepted as authority, are properly admitted in an action for negligently causing death, though the witness giving the preliminary testimony had no knowledge of the way the tables were in fact made up, or of the class of persons included in the estimate.

Same—Same—Same—Harmless Error.

The admission of life expectancy tables, commencing at 30 years

*See *Atchison, etc., Ry. Co. v. Ryan* (Kan.), 21 Am. & Eng. R. Cas., N. S., 684, and foot-note, 685; 15 Cent. Dig., col. 2604 et seq.; 8 Am. & Eng. Enc. Law (2d Ed.) 947 et seq.

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of age, in an action for negligently causing the death of a person 27 years old, did not prejudice the defendant, as the period of expectancy shortens with the increase of years.

Same—Same—Same.

Life expectancy tables, in order to be admissible in an action for negligently causing death, need not show the expectancy at the precise age of decedent, but it is sufficient if they show the expectancy of persons approximately at that age.

Same—Same—Application of Rule Requiring Brakeman to Know That Conductor Is on Train before Starting It.

In an action against a railroad company for negligence resulting in the death of a brakeman while switching, a rule of the company that the rear brakeman should never allow the train to leave the station until certain that the conductor is on the train does not apply to movements of the train while setting out a car.

Same—Fellow-Servant Rule—Instructions.

Where, in an action against a railroad company, the negligence charged is that of the conductor in failing to stop the detached portion of his train while a car was being set out, whereby a brakeman was killed, there is no error in a failure to instruct the jury as to assumption of risk, since, under the Iowa statutes, a railroad employee never assumes the risk of negligence of a co-employee.

Appeal from district court, Page county; A. B. Thornell, Judge.

The defendant appeals from a judgment for damages occasioned by the alleged negligent killing of F. E. Pearl. Affirmed.

J. G. Trimble and G. B. Jennings, for appellant.

Dale & Bissell, Clark & Son, and William Connor, for appellee.

LADD, C. J. The deceased was in the employment of defendant as rear brakeman, and the train on which he made his last trip reached Blanchard after 12 o'clock at night, on its way from Stanberry, Mo., to Council Bluffs, Iowa. The engine, to which were attached 12 or 13 freight cars, stopped north of the depot, on the main track, at the water tank, so that the caboose stood several car lengths to the south of it. The crew, except the fireman, entered the depot; and, upon the arrival of a southbound train on the east side track, Pearl said to the conductor, "Are we ready?" to which the latter responded, "Yes; as soon as we set this car out, we will go." Thereupon the engineer returned to his place, the head brakeman proceeded to tell him to pull down and set the car of lumber out, and, when the train had moved some distance, Pearl signaled it to stop, whereupon he cut off the six or seven cars, with the caboose, behind the car of lumber to be left. The engine, with the attached cars, moved beyond the switch, which the head brakeman set for the house track, next to the main track, and, after Pearl uncoupled the last car, backed and kicked it to the south on the house track. Both brakemen had been working on the left or west side of the train; and Pearl, whose duty it was to ride the car of lumber in and set the brake, attempted to pass over the house track at the north

end (between it and the engine), in order to ascend the ladder on the other side, when the cars connected with the caboose, first detached, on which brakes had not been set, ran against the kicked car, and moved it so suddenly towards the engine that it knocked Pearl down and passed over him; and, as the wheels of the front car on the main track dropped from the ends of the rails, the switch still being set for the house track, he was crushed, and died within an hour. The particular act of negligence alleged is that the conductor failed to set the brakes on the caboose, so as to prevent the detached cars from moving toward the switch, as is alleged to have been his duty. Evidence introduced tended to show that in setting out a car, under the circumstances mentioned, it was usual and customary for the conductors on all trains on defendant's line to set the brake on the caboose, and thereby bring the detached portion of the train to a standstill, immediately upon being disconnected. Appellant insists such evidence was inadmissible, for that it appeared the work was done as usual. This is true with respect to all save the conductor. Whether he ordinarily pursued a different method was not shown, and evidence of the customary way of doing the work was admissible, as bearing on two questions: (1) Was it the conductor's duty to have set the brakes on the caboose? And (2) had the deceased the right to rely upon his doing so?

2. One Hussey testified to the customary way of setting cars out of a train in the circumstances mentioned. He remarked that the hypothetical question described a "condition that is not very often seen"; that he did not remember any like that given, and had never been employed on this particular conductor's train. Appellant urges that, because of these answers his testimony should have been excluded. Precisely to what he referred is not disclosed, unless it was the situation of the crew, and what was said. In any event, these responses did not warrant the rejection of his evidence, but might well be considered in determining the weight to be given to it.

3. Callicott, who had testified to the usual manner of setting cars out, disclosed on cross-examination that he had been discharged from employment as brakeman by defendant, as he claimed, for leaving a switch unlocked. It appeared in a deposition taken at plaintiff's instance that he had said in answer to the question whether he had left it open: "I claim I left it unlocked. I didn't leave it open. I claim I left it unlocked." On the trial he denies so testifying, and insisted his answers were merely, "No, sir." Appellant complains of the exclusion of this portion of the deposition. The ruling was right, (1) because the answer at the trial does not materially differ from that in the deposition; and (2) it was an attempt to impeach on an immaterial matter.

4. Exception was taken to receiving the following rule in evidence: "Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the

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safety of their trains, and they must take every precaution for the protection of their trains." It bore directly on the duty of the conductor to perform the work customarily exacted from him in the protection of his train, and was rightly admitted.

5. The conductor, who had testified to being at the station agent's window to deliver the bill of the car of lumber to be set out, to the occurrences there as heretofore related, to seeing the rear lights of the caboose pass while there, and to walking down to the train, was asked by defendant upon cross-examination whether all that had taken place was in accordance with the customary duties, and also "whether it was not, under such circumstances, the duty of the rear brakeman to see to the setting of the brakes on his end of the train, when necessary for shunting of this car that was to be set out." The mere stating of these questions is enough to show that the objection as not cross-examination was properly sustained. The custom usually followed had not been mentioned. Also certain reports made by the trainmen to the superintendent were offered. Their contents are not set out in the abstract, and the ruling of the court excluding them will be presumed correct.

6. Minnie Pearl, widow of deceased, was permitted to testify, over defendant's objection, that her husband was industrious, that he was earning from \$65 to \$85 a month, and that his actual expenses for himself and family were from \$175 to \$200 per year. The objection that in saying that he was industrious she merely expressed an opinion was properly overruled. The habit of industry is a fact to be established by any one having knowledge. The propriety of receiving evidence of what he was earning and expending shortly before his death is vindicated, and its purpose fully explained, in *Simonson v. Railroad Co.*, 49 Iowa, 87.

7. The deceased was killed October 17, 1897, and would have been 27 years old had he lived till November 8, 1897. Life tables were introduced, indicating the expectancy of life of a person of that age. These, it is urged in support of an objection interposed, could not be received as fixing the expectancy of life of deceased. We know of no such claim ever being made. The tables are supposed to give the average expectancy as ascertained from a large number of cases, and are received for consideration in connection with other circumstances, such as condition of health, hazard of occupation, and the like, in approximately estimating how long deceased would, in all reasonable probability, have lived, but for the loss of life in the transaction under investigation. The objection, as we understand it, is directed to the wording of the offer, which was "to show the expectancy of life of deceased," rather than "as tending to show." This is a distinction not likely to have been observed by the jury, and too technical for ordinary use in ruling on the admissibility of evidence. The Carlisle tables as contained in the *Encyclopædia Britannica* were admissible without preliminary proof.

Scagel v. Railway Co., 83 Iowa, 380, 49 N. W. 990; Haden v. Railway Co., 99 Iowa, 737, 48 N. W. 733. A life insurance manual, containing the American Experience tables, by A. J. Flitcraft, was received. The evidence showed the tables as contained therein to be in general use by insurance men throughout the state, and accepted as authority. This was enough, though the witness had no knowledge of the way these were in fact "made up," or the class of persons included in the estimate. If generally accepted as standard authority, the book was properly received. Gorman v. Railway Co., 78 Iowa, 513, 43 N. W. 303; Kreuger v. Sylvester, 100 Iowa, 647, 69 N. W. 1059. The Carlisle tables indicated the expectancy of a person 30 years old, but not of 27; and of this, complaint is made. But it is a matter of both common and scientific knowledge that after maturity the time of expectancy shortens with the increase of years. Hence the defendant could have suffered no prejudice. In any event, the tables, to be admissible, need not show the precise age, but approximately that of the person involved. As defendant did not ask an instruction limiting the force and effect to be given these tables, it is not in a situation to complain of the court's omission to so instruct.

8. Appellant seems to rely somewhat on rule 421, introduced in evidence: "Rear brakeman should never give signals to go or allow the train to leave the station until certain that the conductor is with the train." This evidently refers to pulling out of the station, and has no application to switching in the yards.

9. Complaint is made of the court's omission to give an instruction on the assumption of risks. There was no occasion for doing so. An employee never, under our statute, assumes the risk of the future, unanticipated negligence of his co-employee of a railroad. The jury may well have found what the conductor said at the station was intended as a direction to the brakeman to set out the car of lumber, especially as it was so treated in his presence; that in doing such work it was a part of the conductor's duties, by setting the brakes on the caboose, to stop it and other cars, after being detached from the one being set out; that deceased, because of the method usually and customarily followed, relied, and had the right to rely, on the conductor to stop said cars at the proper time; that, because of the conductor's omission of this duty, the detached cars struck the car kicked in near the switch, and thereby caused Pearl's death. If so, the omission of duty by the conductor occasioned the loss of life to deceased without fault on his part. The ruling on the motion to strike the amendment to the petition merits no attention. Even were it erroneous, which it was not, no prejudice could have resulted. The appellant's motion to tax the costs of appellee's denial and correction abstract to appellee is sustained. It was entirely unnecessary.

Affirmed.

SOUTHERN RY. CO. v. PACE.*(Supreme Court of Georgia, Feb. 6, 1902.)*

[40 S. E. Rep. 723.]

Fire Set by Locomotive.*

Under the ruling made in the case of *Railroad Co. v. Edmondson*, 29 S. E. 213, 101 Ga. 747, which was followed in the case of *Railway Co. v. Myers*, 33 S. E. 917, 108 Ga. 165, the evidence in the present case was not sufficient to authorize a verdict for the plaintiff, and a new trial should have been granted.

(Syllabus by the Court.)

Error from city court of Baxley; T. A. Parker, Judge.

Action by J. H. Pace against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

De Lacy & Bishop and G. J. Holton & Son, for plaintiff in error.

E. P. Padgett & Son, for defendant in error.

COBB, J. Pace sued the Southern Railway Company for damages growing out of the destruction of timber and fencing by fire which was alleged to have been communicated to the property destroyed from a locomotive of the defendant. The trial resulted in a verdict in favor of the plaintiff, and the case is here upon a bill of exceptions assigning error upon the refusal of the judge to grant the defendant a new trial. The evidence offered to establish the fact that the fire was communicated to the property of the plaintiff from an engine of the defendant was entirely circumstantial, but was of such a character as to authorize a finding that the fire was so communicated. This fact having been established, a presumption of negligence arose against the company, and the controlling question in the present case is whether this presumption was rebutted. The uncontradicted evidence of the defendant showed that the engine from which the sparks were emitted which caused the fire was equipped with the latest improved spark arrester, which was in good order on the date at which the fire occurred; that the engine was in all respects also in good order on that date; and that it was properly handled by the engineer in charge. Under the rulings of this court in *Railroad Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213, and *Railway Co. v. Myers*, 108 Ga. 165, 33 S. E. 917, the evidence of the defendant was sufficient to completely rebut the presumption of negligence; and therefore a verdict in favor of the plaintiff was contrary to the evidence, and a new trial should have been granted for this reason. This case is to be distinguished from the cases of *Railway Co. v. Williams*, 113

*See extensive note, 15 Am. & Eng. R. Cas., N. S., 495 et seq.; 5 Rap. & Mack's Dig. 851 et seq.; 13 Am. & Eng. Enc. Law (2d Ed.) 503 et seq.

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Ga. 335, 38 S. E. 744, and Railway Co. v. Trammell, 114 Ga. 312, 40 S. E. 259, in that in each of those cases there was evidence, independently of the presumption, that the defendant was negligent; it appearing either that the spark arrester was not in good order, or that the engine was improperly handled. Judgment reversed. All the justices concurring.

GREENWICH INS. CO. v. LOUISVILLE & N. R. CO. *et al.*

(*Supreme Court of Kentucky, Feb. 4, 1902.*)

[66 S. W. Rep. 411.]

Right of Insurance Company to Recover against Railroad Where Building Constructed on Right of Way by Permission Is Destroyed by Fire.*

Where a railroad company grants permission to another to construct a building on its right of way on condition that it shall not be liable for loss by fire from its locomotives, the condition is valid, and neither the owner of the building nor an insurance company which has paid the loss can recover of the railroad company for the loss of the building by fire unless there was wanton or willful negligence on the part of its servants.

Insurable Interest.

One who was permitted by a railroad company to construct a building on its right of way upon condition that the company should not be liable for loss by fire had, notwithstanding that condition, an insurable interest in the property, and an insurance company from which he procured insurance thereon, having paid the loss, cannot recover the money paid on the ground that it was paid in ignorance of the terms of the lease and under a mistake of fact, there being no allegation that the mistake was mutual.

Appeal from circuit court, Marion county.

"To be officially reported."

Action by the Greenwich Insurance Company against the Louisville & Nashville Railroad Company and the Frank Fehr Brewing Company to recover damages for loss by fire. Judgment for defendants, and plaintiff appeals. Affirmed.

Lafe S. Pence, for appellant.

John McChord, for appellee Frank Fehr Brewing Co.

W. C. McChord, Lise & McChord, and Edward W. Hines, for appellee Louisville & N. R. Co.

O'REAR, J. It is argued for appellant that the railroad company cannot contract against the consequences of its own negligence, as to do so is not only against public policy, but prohibited by section 196 of the constitution, which in part provides, "No common carrier shall be permitted to contract for relief from its common law liabilities." The court is of opinion that appellee railroad company is not liable for the destruction or damage to the building under the contract quoted, except for willful or wanton negligence of its servants.

*See 13 Am. & Eng. Enc. Law (2d Ed.) 427 et seq.

For mere carelessness, however gross, short of wantonness or willfulness, it will not be liable. It is a matter of common knowledge, and from the language employed in this case we may assume was known to the parties herein, that by the aid of the best contrivances so far known and in use it is impossible to altogether prevent fire caused by spark and cinders from locomotives. Of course the nearer the railroad track a combustible object may be the greater is the danger to which it is subjected from this source. Railroad operators are held liable for damages to the public occasioned by their negligence in failing to provide suitable spark arresters for their locomotives in so far as they reasonably can be had. The company is under no obligation as a common carrier to the public or any member of the public to permit them to erect on its right of way any sort of structure, and if one should erect such building on the company's right of way the company would owe no duty to its owner, save to refrain from willfully or wantonly destroying it. The doctrine upon which the law and the section of the constitution above relied upon are based, prohibiting common carriers from contracting against their own negligence by their servants, is, as suggested, that to do so is against public policy. They can operate their trains only by the employment of servants. To permit employers to contract with their servants that they will not be liable for their negligence, by which an inducement would be offered for carelessness towards the lives of so many people, could not be and is not supported in the law. Common carriers are required to transport passengers and freight, the former with the utmost, the latter with ordinary, care looking to their safety. So passengers are compelled frequently to travel by railroad or not at all, and freight is required to be shipped by that means or not at all. The common carriers, by the conditions under which they exist, and to some extent by operation of the law, have the practical monopoly of this business. They are not upon an equal footing with their customers in the matter of making such contracts, as where they undertake to secure in advance indemnity against the result of their own negligence. Such contracts are clearly against the public policy. But in the case at bar no such necessity exists to the owner of the building that he should erect it upon the company's right of way, nor is the company compelled under any state of case to permit him to do so. It is under no obligation to extend its liabilities. It certainly could not be expected to voluntarily do so. Therefore the parties, when they come to contract with reference to the location of such a building, are dealing, with reference to the location of such a building, at arm's length, and upon an equal footing. The railroad company can well say, "While we are unwilling to assume any additional risks, we are willing to suffer you for your own convenience to build this house upon our right of way within the zone of recognized

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and peculiar danger from fires; but it must be understood that, if you accept the privileges of this grant, you alone must bear its burdens and casualties." It is not so much that the railroad company contracts against its own negligence as that the brewing company agrees to alone bear all risks from fire. It receives a consideration for doing so. We cannot see that the public are in any wise affected by such a contract, nor can they be. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 17 C. C. A. 62, 70 Fed. 201, 30 L. R. A. 193; *Id.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; *Griswold v. Railroad Co. (Iowa)* 53 N. W. 295; *Stephens v. Southern Pac. Co. (Cal.)* 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; *King v. Same (Cal.)* 41 Pac. 786, 29 L. R. A. 755.

Plaintiff also joined the Frank Fehr Brewing Company as a defendant, and by an amended petition claimed that defendant had misrepresented its title to the plaintiff, and that plaintiff had paid the insurance under a mistake of fact; that it did not know that the brewing company had executed a lease with the railroad company by which the brewing company assumed the dangers incident to the extraordinary risk of fire from the near exposure of the building to the passing locomotives. It appears that the brewing company had an insurable interest in the property, and it is not alleged that the mistake was mutual. We are of opinion that the demurrer to the petition should have been sustained.

The judgment dismissing the case as to both of the defendants is affirmed; the whole court sitting.

GULF, C. & S. F. RY. CO. v. MILNER.

(*Court of Civil Appeals of Texas, Jan. 4, 1902.*)

[66 S. W. Rep. 574.]

Liability for Frightening Horse by Giving Statutory Crossing Signals.*

Though a statute requires the blowing of a locomotive whistle at a certain point for a crossing, the company will be liable for the frightening of a horse by such whistle, if the engineer saw and realized that it would frighten him, in the absence of a showing that injury to another at the crossing might have resulted from failure to give the signal.

Declarations of Engineer as Res Gestæ.

Declaration of engineer, where his attention was called to a runaway horse, after blowing signal for crossing, that he had not seen the horse before he blew the whistle, is admissible as part of the res gestæ.

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The error was not immaterial, because the horse was seen by the conductor and the fireman, and they failed to prevent the blowing of the whistle, where the court cannot say that they knew that the

*See extensive note, 5 Am. & Eng. R. Cas., N. S., 282 et seq.; 8 Am. & Eng. Enc. Law (2d Ed.) 421 et seq.; 5 Rap. & Mack's Dig. 1032 et seq.

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engineer did not see the horse, and, if they did, that they should have warned him of the situation, or should have anticipated that the engineer would not perform his duty and blow his whistle if he did see him.

Appeal from Johnson county court; O. T. Plummer, Special Judge.

Action by G. B. Milner against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Ramsey & Odell and J. W. Terry, for appellant.

J. A. Stanford and D. M. Watkins, for appellee.

RAINEY, C. J. Appellee sued to recover of appellant for injuries to himself and buggy, alleged to have been caused by his horse taking fright at the blowing of a whistle, etc., of one of the defendant's engines in the city of Cleburne. The evidence shows that appellee and a companion were in a buggy traveling along a public highway near defendant's track, and at a point near a whistling post, where signals were required by statute to be given in approaching a crossing. A locomotive engine was being operated along said track at the point stated. Signals were given which frightened the horse, causing him to run away, injuring plaintiff and his buggy. Plaintiff seeks to recover on the theory that the blowing of the whistle was negligence, as the employees of defendant saw that the horse was frightened, and they should have refrained from sounding the signal, under the circumstances. Defendant contends that the signal was made in obedience to the requirement of the statutes, and no liability exists therefor, though injury may have resulted therefrom. The court charged the jury, on this phase of the case, that, if the horse was frightened by the signal for the approach to the crossing, it "would not render defendant liable for the injury, unless said employees and agents of defendant saw and realized, or had reasons to know, that such noise would cause fright to the said horse, and probably result in injury, and the burden of proving such knowledge on the part of the employees and agents of defendant blowing such whistle is upon the plaintiff." We are of the opinion that this charge is correct, in the absence of some fact tending to show that injury to another at the crossing might have resulted from the failure to blow the whistle. 3 Elliott, R. R. par. 1264; Railroad Co. v. Blan (Tex. Civ. App.) 62 S. W. 552. The remarks of the court in Railroad Co. v. Yarbrough (Tex. Civ. App.) 39 S. W. 1096, are applicable here, viz.: "Even though there was occasion for blowing the whistle, still, if the employee saw that the horse would be frightened by the noise, and he could desist from blowing the whistle consistently with his duties, and without damage to the master's business, it would be the duty of the servant to refrain for a reasonable time from blowing the whistle under such circumstances, and a failure

to so desist might properly be regarded by the jury as negligence." The object of the statute in requiring a signal to be given on a train's approaching the crossing was evidently to warn those who were on or about to go on the crossing that injury might be prevented thereby; and this requirement should never be disregarded, except in cases of emergency, where the giving of the signal would likely cause injury. When the life of a person is imperiled by the lawful operation of a train, and the danger is discovered by the employees, they must use all the means at their command to avert the danger. So, in a case of this character, if the employees discover the danger, they must desist from blowing the whistle, if it can be done consistently with their duty to those using the crossing. Just what should be done or not done must be controlled by the particular circumstances surrounding each case. If the operatives saw that the giving of the signal was liable to frighten plaintiff's horse, and thereby cause injury, then they should have refrained from giving it, provided they could have, by the proper operation of the train for the safety of those on board the train, protected from harm those at the crossing.

Appellant complains of the action of the court in refusing to admit a statement of the engineer made at the time of the accident under the following circumstances, as shown by a bill of exception properly reserved, to wit: "Baebel, a witness for the defendant, testified that he was the fireman on the engine upon which the whistle was blown, which it is claimed was the cause of the injury to the plaintiff in this case; that said whistle had been blown by the engineer on said engine as a signal for a public crossing; and that after said whistle was blown, and plaintiff's horse had started to run, he (the witness) called the engineer's attention thereto by remarking, 'Look yonder at the runaway.' That witness was then asked by counsel for defendant, the following question: What did the engineer say when you called his attention to the runaway? To which question the witness would have replied that the engineer then said, in effect, that he had not seen the plaintiff before he blew the whistle. The said question was asked for the purpose of showing that he did not have such knowledge at the time the whistle was blown. To which question counsel for said plaintiff objected upon the ground that it would be hearsay evidence, which objection was sustained by the court." This statement was *res gestæ*, and the court erred in not admitting it. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railroad Co. v. Bryant* (Tex. Civ. App.) 54 S. W. 364. If the plaintiff was not seen by the employees, no liability would attach, under the circumstances. It was therefore a material inquiry, and no legitimate evidence bearing thereon should have been excluded. For the error stated, the judgment is reversed and the cause remanded. Reversed and remanded.

Louisville & Nashville R. Co. v. Eubank

On Rehearing.

(Jan. 25, 1902.)

It is insisted by counsel for appellee that under the evidence the exclusion of the statement made by the engineer, as was proposed to be shown by the fireman, was immaterial, as the evidence shows, without contradiction, that, if appellee was not seen by the engineer when the whistle was blown, he was seen by the conductor and fireman, and they were in a position to have prevented the blowing of the whistle, and their failure to do so was negligence chargeable to the appellant. It is not shown by the evidence who had control of the operation of the engine, what was the duty of each in that respect, nor whose duty it was to blow the whistle at the post. If it was the duty of the engineer to blow the whistle, and he did blow it, and at the time he did not see appellee, then negligence cannot be charged to him. Nor can it be said, as a matter of law, that the conductor or fireman knew that the engineer did not see appellant, and, if they did, that they should warn him of the situation, or, if he saw appellee, that they should anticipate that he would not perform his duty, but, instead, blow the whistle, if the situation required him to refrain from doing so. The evidence leaves it in doubt as to the engineer seeing the appellee. Whether the engineer saw appellee is important in determining the question of negligence of the employee, and we cannot tell what effect the admission of the evidence excluded would have produced upon the jury.

The motion for rehearing is overruled.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v. T. R. EUBANK, Doing Business under the Name of T.
R. Eubank & Company.

(Argued November 14, 1900. Ordered for Reargument March 25, 1901.
Reargued November 8, 11, 1901. Decided January 27, 1902.)

[22 Sup. Ct. Rep. 277.]

Constitutional Law—Statute Prohibiting Carriers from Charging More for Short Than Long Haul as an Interference with Interstate Commerce.*

An unconstitutional regulation of interstate commerce is made by Ky. Const. § 218, prohibiting common carriers from charging more for a shorter than for a longer haul, so far as its provisions extend to a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state, as the carrier is thus compelled to adjust, regulate, or fix his interstate rates with some reference to his rates within the state.

Same—Interference with Interstate Commerce.*

Any state statute which in its direct result regulates the interstate transportation of a single individual carrier violates the commerce clause of the United States Constitution.

*The authorities on this subject will be found collected in the opinion.

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In Error to the Circuit Court of Simpson County, State of Kentucky, to review a judgment in favor of plaintiff in an action against a railroad corporation for unlawful transportation charges. Reversed.

Statement by MR. JUSTICE PECKHAM:

The railroad company has brought this case here by a writ of error to the circuit court of Simpson county, state of Kentucky, that being the highest court of the state in which a decision could be had, for the purpose of reviewing the judgment of that court in favor of the defendant in error (plaintiff below) based upon a violation of § 218 of the Constitution of Kentucky. That section reads as follows:

“It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the railroad commission such common carrier, or person, or corporation owning or operating a railroad in this state may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this state may be relieved from the operations of this section.”

This action involves the question of the validity of the above section, as construed by the court below with reference to interstate commerce.

The plaintiff, T. R. Eubank, on June 9, 1899, duly filed in the clerk's office of the Simpson county circuit court a petition in which he alleged, in substance, that he was doing business in Franklin, in the state of Kentucky; that the defendant was a corporation chartered under the laws of that state as a common carrier, and that it owned and operated a line of railway for the transportation of freight and passengers from Nashville, Tennessee, running north through Franklin, Kentucky, and continuing on to Louisville, Kentucky, a distance of 185 miles, and that the distance from Franklin, Kentucky, to Louisville, Kentucky, over the defendant's line, is 134 miles, and is included in and a part of the distance of 185 miles from Nashville to Louisville; that during the years 1897 and 1898 the defendant transported tobacco for the complainant from Franklin, Kentucky, to Louisville, Kentucky, at the rate of 25 cents per 100 pounds, and that during all this

time the plaintiff was shipping and did ship and transport tobacco from Nashville, Tennessee, to Louisville, Kentucky, over the same road, at the sum of 12 cents for 100 pounds; and the complainant averred in his petition that the company had no right to charge him a greater freight rate for the transportation of tobacco from Franklin, Kentucky, to Louisville, Kentucky, than 12 cents per 100 pounds, and he therefore brought suit to recover back from the defendant the difference between that sum and the sum paid by him, viz., 13 cents per 100 pounds, the amount carried being 145,245 pounds.

The defendant tendered special and general demurrers to this petition on the ground, among others, that it sought to make a law of the state of Kentucky applicable to a rate charged by defendant from Nashville, Tennessee, to Louisville, Kentucky; and that if the law were so construed it would become a regulation of interstate commerce and be invalid, because in conflict with and repugnant to section 3 of § 8 of article I. of the Constitution of the United States, and also in violation of the Interstate Commerce Act.

These demurrers were overruled by the court, and thereupon the defendant tendered its answer, setting up its defenses in four separate paragraphs.

By paragraph 1 it substantially admitted the transportation of the tobacco at the rates stated in the plaintiff's petition. In the 2d paragraph it averred that its rate of 12 cents per 100 pounds for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, was made under and in conformity with the act of Congress called the Interstate Commerce Act, above referred to, and that in pursuance of the 6th section of that act the rate was printed, posted, and kept open to public inspection, and duly filed with the Interstate Commerce Commission, and that by virtue of that act it would have been unlawful for the defendant to have charged either more or less than the rate of 12 cents per 100 pounds from Nashville, Tennessee, to Louisville, Kentucky. The defendant further averred that § 218 of the Constitution of the state of Kentucky applied only to a railroad in that state, and had no application to that portion of any railroad that was without the state of Kentucky, and hence had no application to the railroad of the defendant between Nashville, Tennessee, and the state line between Tennessee and Kentucky; and it was averred that the rates which the defendant might charge from Franklin, Kentucky, to Louisville, Kentucky, were not and could not become unlawful under the long-and-short-haul laws of Kentucky, by reason of any rates that might be charged by the defendant on traffic transported from Nashville, Tennessee, to Louisville, Kentucky; and that the long-and-short-haul laws of Kentucky could apply only when both the long and short hauls were within Kentucky, and that the hauls from Nashville, Tennessee, to Louisville, Kentucky, were not within the jurisdiction of Kentucky.

Defendant further averred that at the times named in the petition it charged no rate on tobacco to Louisville, Kentucky, from any point in the state of Kentucky on the same line with Franklin and farther from Louisville than Franklin, less than the rate of 25 cents per 100 pounds charged by it from Franklin to Louisville. It was further averred that if the constitutional provision in question were so construed as to make this rate of 25 cents per 100 pounds from Franklin, Kentucky, to Louisville, Kentucky, unlawful by reason of the less rate charged by it from Nashville, Tennessee, to Louisville, Kentucky, the result would be to regulate commerce among the states by the long-and-short-haul laws of Kentucky, and to compel the defendant to, and it would, raise its rates of 12 cents per 100 pounds from Nashville, Tennessee, to Louisville, Kentucky, unless it could obtain the authority from the railroad commission of Kentucky to charge the less rate from Nashville, Tennessee, to Louisville, Kentucky; that thereby the long-and-short-haul laws of Kentucky would regulate commerce among the states, and would be in conflict with and repugnant to the Interstate Commerce Act, and also subsection 3 of § 8, article I. Constitution of the United States, and would therefore be void; and there was contained in the paragraph the following averment: that "the defendant hereby sets up, pleads, and relies on the right and privilege secured to it by the said act of Congress and by said provisions of the Constitution of the United States, to have its interstate traffic and the commerce conducted among the states and between Kentucky and Tennessee regulated by the Constitution and the laws of the United States, and to be free from the regulation and interference of the Constitution and laws of the state of Kentucky."

By paragraph 3 the defendant set up the statute of limitations of the state of Kentucky.

By paragraph 4 the defendant averred that its rate on tobacco from Franklin to Louisville during the times mentioned was much less than the defendant's standard tariff rates for that distance, and that the less rate resulted from and was necessitated by the fact of competition existing at Franklin, Kentucky, which arose from the fact that tobacco could be and was hauled by wagon from Franklin, Kentucky, to Bowling Green, Kentucky, and then shipped to Louisville on boats plying the Green and Barren and Ohio rivers at extremely low rates of transportation, and on account of competition the defendant had to and did accept the rate of 25 cents per 100 pounds; that but for that competition it would and could have charged a much higher rate, which higher rate would have been just and reasonable, and that the rate of 25 cents per 100 pounds was just and reasonable in itself by reason of the competition.

It was further averred that Nashville, Tennessee, was situated on the Cumberland river, navigable by boats plying

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between Nashville and various points on the Ohio river, including Louisville, Kentucky, and that these boats transported tobacco from Nashville to Louisville at extremely low rates of transportation, and that by reason of this water competition Nashville enjoyed extremely low rates for the shipment of tobacco to Louisville and many other places; and if the defendant, at any of the times mentioned, had charged more for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, than 12 cents per 100 pounds, it would not have secured the transportation of any of said tobacco from Nashville to Louisville, but the same would have been shipped from Nashville to Louisville, or some other tobacco market, at rates less than 12 cents per 100 pounds, and thereby the defendant would have wholly lost the transportation of any tobacco from Nashville to Louisville; and that the defendant succeeded in obtaining, even at the low rate of 12 cents per 100 pounds, the transportation of only twelve hogsheads of tobacco from Nashville to Louisville during the time named in the petition. It was averred that the tobacco transported by the defendant from Nashville to Louisville was transported under the circumstances and conditions thus stated, and that none of the same could have been transported at any higher rate than 12 cents per 100 pounds, and that at none of the times mentioned in the petition was the transportation of tobacco from Franklin to Louisville affected by the circumstances or conditions set forth regarding the transportation of tobacco from Nashville to Louisville, and that the competition at Nashville differed substantially from the competition at Franklin, in that it was far more effective and necessitated a much lower rate, and that in making the difference in rates between Franklin and Nashville the defendant simply recognized the substantial difference in the circumstances and conditions of the transportation from and to the two places.

It was also averred that it was to the advantage of the defendant to transport the tobacco that it might secure from Nashville to Louisville at the rate of 12 cents per 100 pounds, rather than lose such transportation altogether, as it would have done if it had attempted to charge more than the rate of 12 cents per 100 pounds; but the fact that the defendant did transport tobacco from Nashville to Louisville at 12 cents per 100 pounds did not increase the rate that it charged from Franklin to Louisville, or make the rate from Franklin to Louisville any higher than it would otherwise have been; and that if it had refused to transport tobacco from Nashville to Louisville for any less rate than the rate charged from Franklin to Louisville, the Nashville shippers of tobacco could and would have shipped it to Louisville or other tobacco markets over routes which this defendant could not control and at rates not exceeding 12 cents per 100 pounds; and that the defendant could and did engage in the transportation of tobacco

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from Nashville to Louisville at the rate of 12 cents per 100 pounds without in anywise injuring Franklin or any person or interest at Franklin.

Other defenses were set up not now material.

The plaintiff demurred to paragraphs 2, 3, and 4 of the defendant's answer, which demurrer was sustained by the court. The plaintiff then moved for judgment for the plaintiff upon the pleadings, which motion, under objection by the defendant, the court granted, and thereupon it was adjudged that the plaintiff recover of the defendant the sum of \$188.81 and his costs.

Messrs. Walker D. Hines and H. W. Bruce for plaintiff in error.

No brief was filed for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

The writ of error in this case does not bring up for review any judgment of the court of appeals of the state of Kentucky, the highest court of that state. It appears that the circuit court of that state is the highest court in which a decision of the case could be had, presumably on account of the amount of the judgment. There was no opinion delivered by the judge holding the court in which the case was tried, and as the case did not go to the highest court of that state, we are without the benefit of any written opinion of the courts of Kentucky in regard to the question involved. We have already held, in the case of *Louisville & N. R. Co. v. Kentucky*, 183 U. S. —, ante, 95, 22 Sup. Ct. Rep. 95, that the section of the Kentucky Constitution above set forth, as applied to places all of which are within the state, violates no provision of the Federal Constitution.

The effect of the decision by the state court now under review is to hold that the provision of § 218 of the state Constitution is not confined to a case where the long and short hauls are both within the state of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state; and the question is whether the provision of that Constitution as thus construed is or is not a violation of the commerce clause of the Constitution of the United States.

It would seem that the foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the state, making that rate unlawful if it exceed the rate for the longer distance over the same line in the same direction, though, as in this case, the longer distance is from Nashville, Tennessee, to Louisville, Kentucky. The claim must be that the only effect of the provision is to regulate the rate between points within the state, and that it has no direct effect upon, nor does it in any

degree regulate or affect, the rate between points on those points which are within the state. The contention is that the state does not prescribe or regulate the rates outside its borders; that the company may announce and enforce the rate it pleases regarding interstate commerce. It directs that between points within the state of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between points outside and one inside of the state; that this does not constitute an interference with or a regulation by the state of interstate commerce, and hence the provision is valid.

If this contention were correct, and the constitutional provision as construed by the state court did not by its terms permit the state to regulate or immediately and directly influence the interstate commerce of defendant, either as to rates, the provision in question would be valid. Is it correct? And is there no such immediate influence or regulation of the interstate commerce of the defendant?

By the demurrer and the motion for judgment on the demurrer it is admitted that the rates from all points on the defendant's road within the state of Kentucky to Louisville for the transportation of tobacco are not too high, but are in fact just and reasonable in themselves, and to that extent the obligation of a carrier to make charges that are just and reasonable is fulfilled. There is also a rate for the transportation of tobacco from Nashville to Louisville of 12 cents per 100 pounds, and that rate is arrived at because of the existence of water competition between the two points. This rate absolutely prevents the company from making a higher charge, for if it did it would get no business; and on account of the fact that trains are to be run in any event, the expenses incurred by reason of the operation of the line pays the company to take the tobacco at the rate of 12 cents, even though it is below what would otherwise be a reasonable compensation for the transportation. It is, therefore, and the fact is averred, that although under the existing circumstances it pays the company to transport the tobacco from Louisville at the rate of 12 cents per 100 pounds, if it were confronted with the alternative of either giving up such transportation (which a charge of 25 cents per 100 pounds would necessarily result in) or of reducing the charge for the transportation of tobacco from Nashville to Louisville to 12 cents per 100 pounds, it would be compelled to give up the transportation from Nashville rather than reduce the charge for the transportation of tobacco from Franklin to Louisville. If the state of Kentucky has the right to base its provision for the rate of a short haul within its borders by comparison with the rate for a longer haul outside its borders, within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation or even the suppression of the interstate commerce of the carrier, then this provision is valid. Otherwise it would seem to be the reverse.

That the railroad commission is authorized upon application to permit the company to charge less for longer than for shorter distances is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that if the railroad commission should choose, it might permit the interstate charges to remain. In either case the interference is illegal.

The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the states in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the state, unless the consent of the railroad commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms a part of the real subject-matter of the provision, the greater sum for the shorter distance within the state being compared with the lesser sum for the longer distance without the state; and the prohibition is absolute, unless the consent of the commission is obtained, from charging any more for the shorter distance within the state than for the longer distance partly within and partly without the state. And in this case, in order to maintain its state rate, it must fix its interstate rate at an amount which prohibits its doing interstate business.

We fully recognize the rule that the effect of a state constitutional provision, or of any state legislation upon interstate commerce, must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated; and in that event the effect of the provision is direct and important, and not a mere incident.

Although not exactly in point, yet the case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, is somewhat analogous in principle. In that case chapter 114 of the Revised Statutes of Illinois, § 126, came under consideration. That section enacted that if any railroad corporation should charge for the transportation of freight, etc., upon its railroad, for any distance within the state, the same or a greater amount

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of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger, etc., over a greater distance of the same road, such charges should be deemed *prima facie* evidence of unjust discrimination prohibited by the act, and penalties were provided for its violation.

An action was brought to recover for a violation of the provisions of the act, and in the declaration it was alleged that the company had charged Elder & McKinney for transporting goods from Peoria in the state of Illinois to New York city at the rate of 15 cents per 100 pounds, and on the same day the company charged Bailey & Swannell for transporting another carload of the same kind of goods from Gilman in the state of Illinois to the city of New York at the rate of 25 cents per 100 pounds, although the carload transported for Elder & McKinney from Peoria was carried 86 miles further in the state of Illinois than the other carload of the same weight; and it was claimed that as the freight was of the same class in both instances, and carried over the same route, except as to the difference of distance, a discrimination against Bailey & Swannell was made in the charges against them, as compared with those given to Elder & McKinney, and hence suit was brought. Mr. Justice Miller delivered the opinion of this court, in which he expressed some doubt whether the statute of Illinois had been correctly construed by the court below, yet as that court had given an interpretation to it which made it apply to commerce among the states, although the contract was made within the state of Illinois and a part of its performance was within the same state, this court was held to be bound as to the construction given to the act by the state court. What that construction was is stated by the court itself. It said:

“We see no reason to depart from the conclusion reached in this case when it was here before. See *People v. Wabash, St. L. & P. R. Co.*, 104 Ill. 476. But to avoid misapprehension we deem it advisable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other state. We understand and simply hold that, in the absence of anything showing to the contrary, a single and entire contract to carry for a gross sum from Gilman, in this state, to the city of New York, implies necessarily that that sum is charged proportionately for the carriage on every part of that distance; and that a single and entire contract to carry for a gross sum from Peoria, in this state, to the city of New York, implies the same thing; and that, therefore, when it is shown that there is charged for carriage upon the same line less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this state, a *prima facie* case is made out of unjust discrimination under our statute

concurring within this state. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the state line proportionately with the balance of the line. The judgment is affirmed." *Wabash, St. L. & P. R. Co. v. Illinois*, 105 Ill. 236.

In regard to this question, Mr. Justice Miller, in the course of his opinion, said:

"It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the state, and so much more to commerce in other states. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the state of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the state of Illinois, and the city of New York in the state of New York?"

The court held it was the latter, and said, after examining the other cases (page 575, L. Ed. p. 250, *Inters. Com. Rep.* p. 37, *Sup. Ct. Rep.* p. 12):

"We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law."

In regard to the effect of the Illinois statute upon interstate commerce, it was further said:

"Let us see precisely what is the degree of interference with transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the state of Illinois, but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.'

of toll or compensation than is at the same time collected, or received for the transportation in the station of any passenger, etc., over a greater distance of road, such charges should be deemed *prima facie* an unjust discrimination prohibited by the act, and were provided for its violation.

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So that, while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of 15 cents per 100 pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of 25 cents per 100 pounds for carriage to Gilman, in Illinois, which is 86 miles shorter than the distance to Peoria.

“So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of 15 cents per 100 pounds for a carload, but is compelled to pay at the rate of 25 cents per 100 pounds, because the railroad company has received from a person residing at Gilman 25 cents per 100 pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that state. The effect of it is that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of 23 miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.”

Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville, and asks the defendant to carry it. It responds that it would like to carry it at the rate of 12 cents per 100 pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than 12 cents, and that if it were to carry at the rate of 12 cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that state, which would entail a loss in the business between those points which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than 12 cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the state to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the state? If it be, is not the law which accomplishes this result a direct interference by the state with interstate commerce? And if it do not lower its state rates, and in consequence must raise its interstate rates in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the state, of that commerce which ought to be free therefrom?

In *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547, it was said:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state.

The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance) from Nashville to Louisville, for a railroad carrier, that the state might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The state might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the state, than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it, the state could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the state, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists.

It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation, than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its direct result

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regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.

It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several states for the parts in the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the state over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce; and if not, how can it be held an interference by the state when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.

In the case supposed the states have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective state rates already, or from time to time, adopted by the state. In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand the state by such a statute regulates the local rate, but that it has the right to do.

Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate.

In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company.

We are of opinion that as construed by the state court, and so far as it is made applicable to or affects interstate commerce, the 218th section of the Constitution of Kentucky is invalid, and the judgment of the Circuit Court of Simpson County, Kentucky, is therefore reversed, and the case remanded to that court for such further proceedings therein as shall not be inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE GRAY, dissenting:

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I am unable to concur in the opinion and judgment in this case. We have just held that § 218 of the Constitution of Kentucky and § 820 of the Kentucky Statutes, based thereon, are not in conflict with the Constitution of the United States when applied to a case in which both the long and the short haul are wholly within the state. *Louisville & N. R. Co. v. Kentucky*, 183 U. S. —, ante, 95, 22 Sup. Ct. Rep. 95. The constitutional section, briefly stated, forbids a carrier from charging more for a short than for a long haul within which the short haul is included. The prohibition is upon the short-haul charge. There is no prohibition in respect to the long-haul charge, no restriction of the power of the carrier over it, no regulation concerning it, no prescribing by whom or how or when it shall be made,—all this is absolutely untouched by the section.

The proposition now advanced is that while the state may constitutionally prohibit a short-haul charge in excess of a long-haul charge, it can do so only when both hauls are within the limits of the state. Nothing in the section makes such limitation. Nothing in the Federal Constitution, in terms, at least, restricts the power of the state in this respect over its internal commerce. This question may arise under either of two conditions, one in which Congress has prescribed the interstate rate, and the other in which it has left the matter to be fixed by the carrier.

Considering the first of these conditions, suppose Congress in the exercise of its power over interstate commerce should enact that all interstate passengers be charged exactly 4 cents a mile, and the railroad company, while obeying that statute in its charges for carrying passengers from Nashville to Louisville, should from Franklin to Louisville charge 5 cents a mile, could it be pretended that the prohibition of the state Constitution against charging more for a short haul than for a long haul was not operative because an interference with interstate commerce? Has the state no power to compel its corporations to give to parties traveling within its limits the same rates and privileges the Congress prescribes for interstate passengers? And can it not do so by simply prohibiting greater charge for a long than a short haul clause? In other words, is it interfering with interstate commerce when the state, not prescribing the charges for interstate travel, simply require that the passenger shall be charged no higher rates for local travel?

The form in which the state legislation is cast cannot be vital in determining the question of power. If an act which in terms prescribes a rate per mile for local travel the same as has been prescribed by Congress for interstate travel is within the power of the state (and that it is cannot be doubted), surely one accomplishing the same thing by simply forbidding the carrier to charge more for a short than for a long haul is likewise within its power. The state is merely using the

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standard fixed by Congress, and enforcing that standard in respect to local rates. In *Miller v. Swann*, 150 U. S. 132, sub nom. *Miller v. Anderson*, 37 L. Ed. 1028, 14 Sup. Ct. Rep. 52, it was held that the construction of that part of the state statute which authorized the disposal of the state's lands in accordance with the provisions of the public land laws of the United States involved no Federal question. The reference to the land laws of the United States was simply by way of selecting a standard.

But if a state may select as a standard the interstate rates prescribed by Congress, and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto, and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the state respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the Constitution and statute of the state when like action by Congress in the exercise of its constitutional power does not.

It must be borne in mind that there is here no question of reasonableness of rates. It is true the carrier avers that the rate of 25 cents per 100 pounds from Franklin to Louisville was just and reasonable, but it also avers that it made that charge only by reason of water competition, whereas "but for that competition the defendant would and could have charged a much higher rate, which higher rate would have been just and reasonable." According to these allegations, while 25 cents was a just and reasonable rate, a much higher rate would also be just and reasonable; and it is nowhere alleged that a rate of 12 cents—that from Nashville to Louisville—would have been unreasonable as a rate between Franklin and Louisville. If invalid at all, it is not because it is no higher than the rate between Nashville and Louisville, but because it is in and of itself unreasonably low for the services rendered. As the amount of tobacco which the defendant shipped from Nashville to Louisville between February 23 and July 15 was only twelve hogsheads, weighing 20,910 pounds, and paying \$25.09 freight, it is obvious that the loss of this entire amount of freight would not have worked a confiscation of the defendant's railroad property, if that be the test of reasonableness so far as the power of the legislature over rates is concerned, though as to the true test of reasonableness see *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, sub nom. *Cotting v. Godard*, ante, 30, 22 Sup. Ct. Rep. 30.

The question may be looked at in another light. The railroad company avers that it made its rate of 12 cents from

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Nashville to Louisville in conformity with the act of Congress; that the said rate was duly printed, posted, and kept open to public inspection, and that by virtue of the Interstate Commerce Act it was unlawful for it to charge either more or less than the rate of 12 cents from Nashville to Louisville. Suppose the legislature of Kentucky, accepting that statement as correct, should pass an act in terms prohibiting this company from charging more than 12 cents from Franklin to Louisville, who would undertake to say that such act was unconstitutional without evidence that in and of itself the rate of 12 cents was unreasonable within some recognized definition of reasonableness? Does the act become *prima facie* unconstitutional because, instead of naming 12 cents, the legislature forbids the carrier from charging more than 12 cents, which the carrier has fixed as its rate from Nashville to Louisville?

Again, Louisville is on the northern border of the state, and the route of defendant's railroad extends through the state, and thence southward to Nashville. Every place on the line of the road within the limits of Kentucky makes, therefore, a shorter haul to Louisville than the haul from Nashville, and is included in the latter. Under the reasoning of this opinion the state of Kentucky has no power to prescribe a rate from any point within the state of Kentucky to Louisville which shall be less than the rate which the company has fixed from Nashville to Louisville. Nor are we to suppose that competition between Nashville and Louisville is limited to the matter of the transportation of tobacco. It is a competition between water and railroad transportation, and naturally extends to all articles of freight, as well as to passengers. By the reasoning of the opinion the state of Kentucky would be powerless to compel the Louisville & Nashville Company to charge a less than the competitive Nashville rate, no matter how reasonable, from any point within its borders to Louisville. It does not seem to me that much is left of state control over local rates.

In the opinion of the court it is said:

"The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the states in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. . . . We fully recognize the rule that the effect of a state constitutional provision, or of any state legislation, upon interstate commerce, must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be

to limit or prohibit the transportation of articles from the state to a point within it, or from a point within it to a point without the state, interstate commerce is affected, and may be thereby to a certain extent regulated; and in that event the effect of the provision is substantial and important, and not a mere incident."

The fallacy of this is that it makes transportation by the Louisville & Nashville Company essential to commerce between Nashville and Louisville. The burden of the case on the part of the company is that there is competition in Nashville for the transportation of tobacco to Louisville; that it must make a low charge to get a share of that transportation; not that the tobacco will not be transported, but that commerce will be interfered with, but that the company will lose some portion of that transportation. In order to exercise the power of the state of Kentucky over this commerce, which it has created, in respect to local rates, in such order that the corporation may obtain some portion of that state transportation. I think we may well recall that said only three weeks since by this court in the opinion in the case referred to, of this same company against the state of Kentucky:

"It may be that the enforcement of the state regulation against discrimination in rates in the case of articles of different kind carried for different distances over the same line somewhat affect commerce generally; but we have held that such a result is too remote and indirect to be considered as an interference with interstate commerce; that the exercise of the commercial power of the general government must be direct, and not the merely incidental exercise of enforcing the police powers of a state. *New York & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 439, 1043, 1046, 15 Sup. Ct. Rep. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. Ed. 953, 17 Sup. Ct. 532."

Another matter is worthy of consideration. Suppose Congress enacts that an interstate rate shall be the same as the local rates prescribed by the several states for the same through line within their borders. Will it be contended that this is an interference with the power of the states to regulate their local rates? Does the mere fact that Congress accepts the local rates and makes them the basis of an interstate rate constitute an interference by Congress with local commerce? That be not so, how, on the other hand, can it be considered a mere recognition by the state of existing interstate commerce as a basis for its legislation concerning local rates is an interference with interstate commerce?

I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the state of Kentucky may see fit to enforce by simply showing that outside of the state it somewhere touches a competitor.

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and is forced to reduce its interstate rates by reason of the competition there existing. In other words, if in the present case there was in fact no water competition between Nashville and Louisville, or if there was no tobacco shipped from Nashville to Louisville, I take it no one would seriously contend that the railroad company, by affirming that there was, could upset the provisions of the Kentucky legislation. There would be a question of fact to be determined, even according to the theory that competition in interstate rates has anything to do with local rates, and that question of fact might be presented in actions like the present,—actions for overcharges, actions in which the parties would have the right to trial by jury. Suppose that one jury, upon the testimony presented before it, should find that there was water competition between Nashville and Louisville, and that there was tobacco shipped between the two places, and another jury, upon the testimony introduced in a succeeding case, exactly the contrary, is the legislation of Kentucky to be declared unconstitutional in one case and constitutional in the other?

It seems to me, in conclusion, that a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard,—the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment.

I am authorized to state that MR. JUSTICE GRAY agrees with this dissent.

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(Supreme Court of Michigan, March 4, 1902.)

[89 N. W. Rep. 349.]

Personal Injuries—Physician's Testimony.

Where, in an action for personal injuries, the declaration alleged that as a result of such injuries plaintiff was for a long time in a condition of severe mental, nervous, and surgical shock, testimony of a doctor as to the seriousness of the shock to plaintiff was not objectionable, as calling for a conclusion.

Accident at Crossing—Evidence—Harmless Error.

Where, in an action against a railway for injuries at a street crossing, defendant's engineer, who had charge of the engine, testified that the train was late, the admission of the testimony of a passenger that the station agent at a station near the place of accident told him, in reply to an inquiry, that the train was 23 minutes late, if hearsay, was harmless.

Evidence—Mortality Tables.

Where, in an action for personal injuries, there was testimony on the part of plaintiff that his injuries were of a permanent character, it was not error to admit mortality tables in evidence.

Haines v. Lake Shore & M. S. Ry. Co**Accident at Crossing—Evidence—Ordinance Limiting Speed.***

In an action against a railway for injuries at a street crossing, it was not error to admit in evidence a city ordinance limiting the rate of speed of trains in the city, in view of defendant's objection that it was incompetent and irrelevant, and the judge's charge that, if the train was running at a greater rate of speed than allowed by the ordinance, it might be considered as a circumstance from which negligence might be inferred, but, if it was not so running, then the rate could not be considered as a circumstance.

Same—Stop, Look, and Listen—Failure to Give Signals—Question for Jury.

Where, in an action against a railway for injuries at a street crossing, plaintiff's testimony that he stopped and looked at the proper place, because at that point he could get a better view of the track than at any other point, and that one could not turn around nearer the track because of the narrowness of the road, was supported by the testimony of several witnesses, and the testimony of witnesses, who claimed to be listening, that the bell was not rung or whistle blown when approaching the crossing, was disputed by the train men and other witnesses for the defendant, and the question whether the train could be seen or not was also a disputed one, it was proper to submit the case to the jury.

Error to circuit court, St. Joseph county; George L. Yapple, Judge.

Action for injuries by Thomas J. Haines against the Lake Shore & Michigan Southern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The judge's charge on defendant's negligence, referred to in the opinion, is as follows:

"It was the duty of the defendant company to exercise reasonable care, skill, and diligence in operating and running its trains. Reasonable care and diligence is such care and diligence as an ordinarily prudent man would exercise over his own affairs under like circumstances. Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it; or, to state it briefly, negligence is the absence of due care under the circumstances. The defendant company is not an insurer of people's lives or property. Reasonably prudent care and management in operating and running its trains is all that can be required of the defendant. The plaintiff claims, as I have said, that the defendant was running its trains at a greater rate of speed than 20 miles an hour, within the limits of the city of Three Rivers, in violation of the ordinance which has been introduced in evidence. For the purpose of this trial, you will assume that said ordinance was valid and in force in said city at the time of the accident in question. The plaintiff agrees that for the purpose of this trial it shall be considered as limiting the rate of speed of railway trains within the limits of said city to 20 miles an hour, or, in other words, as per-

*See generally, Schmidt v. St. Louis R. Co. (Mo.), 22 Am. & Eng. R. Cas., N. S., 711, and foot-note.

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mitting a rate of speed of 20 miles an hour. The defendant claims that the train was not running to exceed the rate of 20 miles an hour. If you find from the evidence in the case that this train was running at a greater rate of speed than 20 miles an hour when approaching the crossing in question within the limits of said city, then such act on the part of the defendant may be considered by you as a circumstance from which negligence may be inferred in determining whether the defendant was or was not guilty of negligence. If you find that the rate of speed of the train in approaching the crossing, within the limits of the city of Three Rivers, was no greater than the rate permitted by said ordinance,—that is, if it did not exceed 20 miles an hour,—then the rate of speed at which the train was running cannot of itself be considered by you as a circumstance from which negligence may be inferred. But it may be negligent for a train to approach a crossing in a city or village at a rate of speed no greater than that permitted by an ordinance of the city or village. But there must be facts and circumstances, apart from the rate of speed itself, tending to show that it was careless to run at the rate of speed complained of, or a finding of negligence would not be warranted. While there may be circumstances which would require a less speed than the rate permitted by such ordinance, it is only the force of those circumstances which creates such duty. If, in view of the situation of the crossing in question, and its surroundings as shown by the evidence, ordinarily reasonable care and prudence and due regard for public safety required the railroad company to run at a less rate of speed, then it was the duty of the company to observe such care and prudence, and its failure so to do would be negligence on its part. The ordinance of the city of Three Rivers, permitting the company to run its trains within the limits of the city at the rate of 20 miles an hour, would not justify such speed, if in fact negligent in view of the surrounding circumstances. It is for the jury to determine, from the evidence in the case, the rate of speed at which the train in question was running when approaching the crossing, and at the time of the accident, and whether or not such speed was negligent; and in determining that question you may consider, not only the testimony of witnesses as to their opinion of its speed, but also the testimony concerning the manner in which the train was stopped, the distance run by the train after striking the carriage of plaintiff and before it could be stopped, and all of the facts and circumstances bearing upon the question as shown by the evidence."

Boudeman & Driver, for appellant.

Marshall L. Howell, for appellee.

MOORE, J. This is an action commenced by the plaintiff against the defendant to recover for an injury received by him at a crossing of the highway over the Lake Shore railway

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track at the city of Three Rivers. He recovered a verdict. The case is brought here by writ of error.

The accident occurred in the early evening. Rock River avenue enters the city of Three Rivers, coming from the northwest, going toward the southeast, until near the crossing of the Lake Shore railway track, which is on Fifth street, when Rock River avenue turns to the east upon Fifth street. This avenue does not run parallel with the railroad company's right of way, but for a portion of the way before reaching Fifth street it runs nearly so. It then turns to the left and crosses the railroad track. The plaintiff was a practicing physician, and on the evening in question he made a professional call on Rock River avenue, and then started for his home in Three Rivers. The train of defendant coming from the north was late. He drove along until he came from 50 to 75 feet from the track, when he claims to have stopped, looked, and listened, and, not hearing any indication of a train, he continued his journey, continuing to look and listen, when the first intimation which he had of the coming train was the flash of the headlight upon his horse. The plaintiff testified he stopped at the usual distance for stopping at that crossing, and looked and listened. In reply to the question of what he meant by the usual distance he said: "At that place the usual distance is where the roadway turns to go across the track. There is quite an abrupt turn. It is at a distance between 50 to 75 feet, somewhere along there. There were two trees over in the road, and as I stopped my horse to look up the track the trees were just a little ahead. They were outlined against the embankment beyond and right up against the sky. My hearing and eyesight were good. I neither heard nor saw the train. There was no signal given by anybody, or any warning of the coming of the train, to my knowledge. * * * Q. State whether or not you could have turned at that point, if you had desired to. A. I don't believe any one could have turned at that place without backing up and turning. You might take a long time and turn around. Q. For what reason? A. On account of the narrowness of the road, which was occasioned by a great pile of brush on the right-hand side and the embankment on the left-hand side. * * * Q. You say you stopped, and you looked and listened, and heard nothing, and saw nothing. Was there any other place along there where you could have stopped and listened so well, or where you could see so well, as at the point at which you did stop, that you know of? A. I don't know of any place that would be near enough. If you went further southwest to the track, you would be less safe; and, if you stopped further back, then you would stop before the road turns, and there would be no use of stopping. Q. Why couldn't you stop further back? A. You are going the same direction as the train is. After I started up, my horse went along at the ordinary gait until the horse was very near the

track. I think his head was almost to the track, when suddenly I saw the light on the horse, and the horse threw up his head; and I also saw the light at that time, and he sprung forward, and I realized that the train was there. Q. Did the bell ring or whistle blow? A. There was no noise, except the rumbling of the train. The buggy did not make any noise as I rode along. There was a light snow falling, and the ground was not frozen. The snow had been damp, I think, during the day, and the wheels cut into the sand pretty well, and made a rut under the wheels. It was so moist that the horse and buggy made no noise."

The evidence shows the track was not straight, but was curved. The witnesses disagree as to how much the view of the track was obstructed by bushes, and by a cut and the earth thrown out of the cut. It was the claim of the plaintiff that the crossing was a dangerous one, that the train was late and was running at an unusual rate of speed, that no signal of the approaching train was given, that he himself was free from negligence, and that the negligence of the defendant company was the proximate cause of the accident. The record is a very long one. Upward of 40 witnesses were sworn. There are upward of 60 assignments of error, and yet the case does not differ substantially from the other cases which find their way to this court, growing out of personal injuries at highway crossings over railway tracks.

Some assignments of error relating to the admission of testimony call for our attention. It is said the court erred in allowing one of the doctors to testify to the seriousness of the shock to the plaintiff, as calling for a conclusion. One of the things alleged in the declaration is that, as the result of his injuries, the plaintiff was for a long time in a condition of severe mental, nervous, and surgical shock. We do not think the testimony was objectionable.

It is said the court erred in allowing a witness who took the train at Schoolcraft to testify that the station agent told him, in reply to an inquiry, that the train was 23 minutes late, because this was hearsay. We do not need to express any opinion upon that subject, because the defendant's engineer, who had charge of the engine, testified to substantially the same thing, and, if its admission was incompetent, no harm was done.

It is said the court erred in allowing the mortality tables to be introduced in evidence, citing *Foster v. Village of Bellaire* (Mich.) 86 N. W. 383. There was testimony on the part of the plaintiff that his injuries were of a permanent character, and, if this was true, the testimony was admissible.

Complaint is made of the refusal of the circuit judge to give defendant's requests to charge. The defendant offered 37 written requests to charge. Instead of giving all of these requests, the circuit judge gave some of them, and covered all the others which should have been given in a general charge

of exceptional clearness, covering every proper phase of the case. The charge itself covers 17 printed pages of the record, and does not omit anything to the prejudice of the defendant.

Error is assigned upon the admission of an ordinance limiting the running of trains to 8 miles an hour. In reply to an inquiry by the court, the counsel stated his objection was that any ordinance relative to the speed of trains is incompetent and irrelevant. It was afterwards shown that by resolution the speed of trains at this point was allowed to be 20 miles an hour. It may be well to quote from *Thomp. Neg.* (2d Ed.) §§ 1552-1554: "As already seen, the rights of the general public traveling a common highway and of a railway company crossing it are reciprocal; and, although common convenience and the rights of the traveling public to rapid transit give the railway train precedence upon the crossing, it is upon condition that those in charge of the train will give reasonable warning of its approach, so that a person or vehicle upon the highway may stop and wait for it to pass. Gates, gatemen, and automatic signals at crossings may dispense with the duty of giving audible signals from approaching trains; but the traveling public have the right to a reasonable and adequate warning of the fact that a train is approaching, whether such warning be given at the crossing itself or from the approaching train. As to the nature and kind of warning which the railway company is bound to give, the law does not undertake to lay down a rule applicable to all cases. Ordinarily, the ringing of the bell or the sounding of the locomotive whistle as the train approaches the crossing, and within a reasonable distance from the same, is no doubt sufficient; but at crossings peculiarly dangerous the maintaining of gates, gatemen, or automatic signals may be demanded as a reasonable safeguard to the public. As we shall more fully see when treating of the contributory negligence of travelers at railway crossings, judicial opinion tends to the conclusion that, in the absence of directions embraced in statutes and municipal ordinances, the railway company discharges its general duty by giving such warnings as may reasonably be expected to protect travelers who themselves are in the exercise of reasonable care and vigilance. As the law cannot undertake to lay down any exact rule on the subject of the number and kind of signals required, the same depending upon the character of the crossing, the speed of the train, and all the surrounding circumstances, which determine the danger to be anticipated and provided against, it becomes in most cases a question of fact for a jury, under proper directions from the court, as in other cases. * * * This duty exists independently of statutes or ordinances. It is usually regarded by the courts as imperative, and negligence is either conclusively ascribed to its omission, or it is regarded as evidence of negligence to be considered by a jury, provided, however, that this omission is the proximate cause of the accident to the traveler, who is himself without contributory fault. In such cases, a traveler who has exer-

cised what care he can by the use of his faculties is justified in assuming that the railway company will not neglect this duty. * * * Although the legislature has granted to a municipal corporation a general power to make regulations upon this subject, yet this power is subject to the common-law principle that municipal ordinances must be reasonable, and that whether they are reasonable or unreasonable is a question to be determined by the judicial courts. Exercising this power, it has been held that a municipal ordinance requiring the ringing of the bells of locomotives at street crossings, and the presence of flagmen at the more important crossings, is reasonable and proper, and so of an ordinance requiring the ringing of the bell of a locomotive within the corporate limits of the city; and the ordinance is applicable even to the yards of the railroad company, situated in a thickly settled portion of the city, and traversed by people at all times and places; and so of an ordinance requiring the bell of a locomotive to be continually rung while the locomotive is in motion within city limits, and prohibiting the running of locomotives at more than five miles an hour, as applies to a street crossing within three blocks of the railway depot in the city." We do not think the court erred in admitting the ordinance in evidence, in view of the objection and his charge as to what constituted negligence on the part of the defendant.

The most serious question in the case is, did the court err in submitting the case to the jury? Counsel for defendant says the court should have directed a verdict for the defendant. In the case at bar the statement of plaintiff that he stopped and looked at the proper place, because at that point he could get a better view of the track than at any other point, and that, because of the narrowness of the road nearer the track, one could not turn around, if it was necessary to do so, was sustained by the testimony of several witnesses. The case is nearly parallel to *Whitman v. Railroad Co.*, 156 Pa. 175, 27 Atl. 290, where the court said: "The learned judge nonsuited the plaintiff for violation of the rule which requires a traveler, about to cross a railroad track, to stop, look, and listen, because he held that the evidence showed that, where plaintiff stopped, the trains could neither be seen nor heard. The rule has been enforced and reiterated in so many cases, from *Railroad Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753, down, that it needs no further discussion. As was said in *McNeal v. Railway Co.*, 131 Pa. 184, 18 Atl. 1026: 'Experience has confirmed the wisdom of its adoption, and it will not be relaxed nor pared down by exceptions. But it is a rule which in its nature is applicable only to clear cases, to those which practically only admit of one view.' We are unable to agree with the learned judge that this is such a case. It is true that the place where plaintiff stopped was 100 feet away from the track, and afforded a very short view, about 35 yards to the eastward, and that further view was then cut off, not only by a curve in the track, but by a hotel. But, notwith-

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standing these disadvantages, five witnesses besides the plaintiff, one of them a liveryman, testify that this was a usual and customary stopping place, used by drivers coming in that direction. The witness Ervin explains why this place was preferred, because there is a break or level place in the track which then runs at a downgrade until so near the crossing that some horses cannot safely be checked there. Plaintiff testified that they not only stopped at the crossing but then waited until two trains in opposite directions had passed but then drove on, and 'slacked up' nearer the crossing to see or hear whether there was anything coming.' In this testimony, we do not think the court could safely say as a matter of law, that the place where plaintiff stopped was one which reasonable prudence would sanction for a stop." See *Grenell v. Railroad Co.*, 124 Mich. 8, 8 N. W. 843; *Railroad Co. v. Miller*, 46 Mich. 532, 9 N. W. 843.

In this case the claim that no signals were given by the bell or blowing the whistle was not simply that the witnesses did not hear them, but some of the witnesses were listening, that they heard the rumble of the train, one of them says no whistle was blown until the train was directly upon the crossing. This testimony was contradicted by the train men and other witnesses called by defendant. The question of whether the train could be seen or not was a disputed question in the case about which witnesses testified. In *Becker v. Railway Co.*, 121 Mich. 580, 80 N. W. 1011, 51 Mich. 143, 13 Am. St. Rep. 457, the question was said: "The rule is well settled that the question of contributory negligence should be submitted to the jury when the testimony is conflicting, or where the facts are free from doubt upon the facts, or where candid and intelligent men might reach different conclusions upon the facts." See *Swoboda v. Ward*, 40 Mich. 420; *Teipel v. Hilseman*, 46 Mich. 461, 7 N. W. 82; *Railway Co. v. Miller*, 46 Mich. 532, 9 N. W. 841; *Lewis v. Railway Co.*, 54 Mich. 55, 34 N. W. 744, 52 Am. Rep. 790; *Palmer v. Railroad Co.*, 56 Mich. 22, 32 N. W. 88; *Staal v. Railroad Co.*, 57 Mich. 239, 37 N. W. 795; *Luke v. Mining Co.*, 71 Mich. 364, 39 N. W. 118; *City of Lansing*, 75 Mich. 499, 42 N. W. 1011, 51 Mich. 143, 13 Am. St. Rep. 457; *Adams v. Iron Cliffs Co.*, 271, 44 N. W. 270, 18 Am. St. Rep. 441; *Brezee v. Railway Co.*, 80 Mich. 172, 45 N. W. 130; *Underhill v. Railway Co.*, 81 Mich. 43, 45 N. W. 508; *Guta v. Railway Co.*, 81 Mich. 45, 45 N. W. 821; *Engel v. Smith*, 82 Mich. 1, 46 N. W. 1011, 51 Mich. 143, 13 Am. St. Rep. 457; *Roux v. Lumber Co.*, 85 Mich. 102, 45 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102; *City of Battle Creek*, 95 Mich. 266, 54 N. W. 757, 34 N. W. 757, 13 L. R. A. 641, 35 Am. St. Rep. 561." See, also, *Willet v. Railway Co.*, 114 Mich. 411, 72 N. W. 260; *Ryan v. Railway Co.*, 114 Mich. 597, 82 N. W. 278.

The case was very carefully tried, and we do not see any reversible error in it. Judgment is affirmed.

LONG, J., did not sit. The other justices concurred.

CHISHOLM v. SEATTLE ELECTRIC CO.*(Supreme Court of Washington, Jan. 8, 1902.)*

[67 Pac. Rep. 601.]

Accident at Crossing—Contributory Negligence.

In an action against a street railway for injuries at a crossing, plaintiff testified that when he started to cross the street he did not see any car moving in his direction. It was shown that the ordinary rate of speed of cars was 10 miles an hour, and that a greater speed than 12 miles an hour was prohibited; that the car was going from 16 to 18 miles, some witnesses placing its speed as high as 20 miles; that no bells were sounded or warning given; and that the crossing was a crowded one. The motorman did not see plaintiff until he was within 30 feet of him, and testified that the car could not have been stopped in less than 50 feet if moving 12 miles an hour: *held*, that the question whether plaintiff was guilty of negligence was for the jury.

Same—Street Railways—Duty to Look and Listen.

One about to cross a street car track is not bound to look and listen, in order to be free from negligence.

Appeal from superior court, King county; George Meade Emory, Judge.

Action by W. A. Chisholm against the Seattle Electric Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Root, Palmer & Brown and G. Ward Kemp, for appellant.
Struve, Allen, Hughes & McMicken, for respondent.

DUNBAR, J. Action for damages for injuries alleged to have been received by appellant through being run over by a street car owned and operated by respondent. At the close of plaintiff's testimony the defendant challenged the sufficiency of the same and moved for judgment in its favor. The motion was sustained by the court, and this appeal involves the right of the court to sustain the motion, together with the alleged error of the court in striking out certain testimony.

The testimony, in brief, shows that defendant has two car tracks on Second avenue in the city of Seattle, where the accident occurred; the cars running north on the east track and south on the west track. The tracks are about six feet apart, running parallel with each other. The avenue is paved with brick where the accident occurred, and for several blocks each way; the street crossing being no different from the other portions of the avenue, and it being the custom of the people to cross anywhere and everywhere in that vicinity. The testimony also shows that Second avenue is one of the principal business streets in the city, and, at the point where the accident occurred, is ordinarily crowded with pedestrians and vehicles. The testimony of appellant is to the effect that when he left the sidewalk to cross the street he looked for cars, and saw two going south,—one nearly opposite to him, and one about a block away,—but did not see any moving north. He then proceeded across the street at an ordinary gait, when he was struck by a car going north, and run over

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by said car, which crushed his leg, necessitating amputation. We cannot understand upon what theory the court decided this case from the jury, unless upon the theory that it is negligence as a matter of law for a pedestrian to fail to listen when he crosses a street car track. But this court has uniformly held that the rule which in that respect applies to steam railroads does not apply to street cars. This was again affirmed in a case recently decided by this court, viz., *Burian v. Seattle Electric Co.* (filed Dec. 14, 1901, 61 Pac. 214; and on the law announced in that case the question in this case would have to be reversed and the question of negligence under the circumstances submitted to the jury. We have often announced the rule that, where circumstances are shown from which different conclusions could be reached by reasonable men, the question of negligence is always for the jury, and that the judge usurps the function of the jury and commits error when he substitutes his judgment for the judgment of the jury. This subject was again recently decided at length by this court in *Mischke v. City of Seattle* (filed Dec. 16, 1901, not yet officially reported) 67 Pac. 357.

Respondent relies upon the case of *Helber v. Railroad* (22 Wash. 319, 61 Pac. 40; but it seems to us the case is entirely distinct in their circumstances that they may bear no relation to each other. It must be remembered that in this case the plaintiff's testimony shows negligence on the part of the defendant. It shows the ordinary rate of speed was 10 miles an hour, that the company was prohibited from running cars at a greater rate of speed than 12 miles an hour, and that the car which injured plaintiff was running at a higher rate of speed; some of the witnesses testified that it was going from 16 to 18 miles, and some of them testified that it was running at the rate of from 18 to 20 miles an hour, and no bells were sounded or other warning given. If the car had been running at a proper rate of speed, the accident probably would not have occurred. At least, it might not have occurred, and it is a well-established rule of law that a pedestrian is not charged with the negligence of the car operators, but that he is justified in basing his calculations and ordering his movements on the assumption that the car will be operated, not only in conformity with local regulations, but with the highest degree of care and regard for the safety of the traveling public, who are entitled to the use of the streets. According to the testimony this car came dashing down a populous street at an unusual, illegal, and dangerous rate of speed, and coupled with the great distance the car ran after striking plaintiff, and the testimony of an expert as to the distance which the car could be stopped, might reasonably present to the jury the question of willful negligence on the part of the defendant. The evidence of the defendant, in answer to the interrogatories propounded to it, shows that the car

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did not see plaintiff until he was within 30 feet of him; but he ought to have seen him before that. It must of necessity be the duty of some one on a car to look out on the track ahead of the car for a reasonable distance. The motorman says that the car could not be stopped, even when traveling at the rate of 12 miles an hour, in less than from 50 to 75 feet, and yet he did not see the man, who was practically on the track, until within 30 feet of him. Such conduct as this can only be indulged in on the theory that the street car owes no duty whatever to the pedestrian, and is not obliged to notice the pedestrian until it is too late to avoid running him down. So long as life and limb are esteemed of more value than rapid transit, such rights cannot be conferred on such irresistible and dangerous engines of locomotion. In any event, the testimony plainly shows that the question of whether or not the plaintiff was guilty of such negligence as would preclude him from recovery should have been submitted to the jury. *Burian v. Seattle Electric Co.*, supra; *Mischke v. City of Seattle*, supra; *Smith v. Trunk Line*, 18 Wash. 352, 51 Pac. 400, 45 L. R. A. 169; *Steele v. Railway Co.*, 21 Wash. 287, 57 Pac. 820; *McQuillan v. City of Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Traver v. Railroad Co.* (Wash.) 65 Pac. 284.

We will not discuss the other errors alleged in relation to the striking of testimony, as they will probably not occur at the new trial; but, for the error of the court in sustaining the challenge to the evidence, the judgment is reversed.

REAVIS, C. J., and WHITE, MOUNT, ANDERS, and HADLEY, JJ., concur.

MINNEAPOLIS & ST. L. R. CO. v. CHICAGO, M. & ST. P. R. CO.

(*Supreme Court of Iowa, Feb. 3, 1902.*)

[88 N. W. Rep. 1082.]

Right of Way—Commencement of Condemnation Proceedings—Statute.

Under Code, § 1995, authorizing a railway company to condemn land "for the location, construction, and convenient use of its railway," no prior location or survey is necessary, and, if made, is not the commencement of condemnation proceedings, so as to give a prior right as against another company.

Right to Cross Right of Way of Another Company.*

A railroad company may cross a right of way condemned by another company.

Eminent Domain—Right of Way—Subsequent Condemnation Proceedings against Grantor by Another Company.

A railroad company, which has purchased land for right of way, and is in possession, is not affected by condemnation proceedings against the grantor by another company.

Same—Same—Title by Purchase.

A railroad company acquires land by purchase, and not by condemnation, where it takes a deed therefor before the award is made and paid.

*See generally, 8 Am. & Eng. Enc. Law (2d Ed.) 338 et seq.; 3 Rap. & Mack's Dig. 390 et seq.

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Same—Jurisdiction.

The owner of land not having refused to make a deed, and there being no disagreement as to compensation, proceedings by a railroad company to condemn are without jurisdiction.

Appeal from district court, Hamilton county; W. B. Quarton and S. M. Weaver, Judges.

Suit in equity to enjoin defendant from crossing plaintiff's right of way and depot grounds in the town of Storm Lake. A temporary writ was granted by Judge Helsell without notice, and on defendant's motion Judge Quarton dissolved the writ. The case was thereafter tried on its merits before Judge Weaver, and a decree entered dismissing the plaintiff's petition. From the order dissolving the temporary writ and the decree on the merits, plaintiff appeals. Affirmed.

Albert E. Clarke and R. M. Wright, for appellant.

J. C. Cook, for appellee.

DEEMER, J. These parties are each railway companies. In the spring of the year 1899 they had each determined to extend their respective lines into the town of Storm Lake,—plaintiff from the north or northeast, and defendant from the south or southeast. Plaintiff first surveyed and staked out its line through the town. Thereafter defendant staked out a line, which will be hereinafter referred to, that crossed plaintiff's line at a point where the station grounds were to be located. A committee selected by the citizens of the town, who were anxious to have both roads constructed, and so built that one would not interfere with the other, requested plaintiff to change the location of its line so that defendant might more advantageously locate its station and depot grounds. Pursuant to this request, plaintiff, on February 27, 1899, caused a second survey to be made, and subsequently, on March 17th, caused a third one to be run, which was parallel to, and 300 feet west of, the second survey. It is claimed that plaintiff's right of way and depot grounds were selected along the lines of this third survey by its general manager and chief engineer on March 4, 1899, and that the subsequent survey was in accord with this selection. On March 4th the citizens' committee to which we have referred was notified that plaintiff would require for its station grounds a tract of land 300 feet wide extending to a point beyond the northern limits of the town. On March 31st the said committee made a proposition to furnish practically all the ground required for the consideration of \$22,000. Plaintiff accepted the proposition on the day it was made, and on April 14th paid \$10,000 of the consideration. None of the preliminary surveys made by plaintiff were actually adopted, but the line on which the road was constructed was staked out April 6, 1899. It ran along the side of the one surveyed March 17th, and the track was about 50 feet from the preliminary survey. As we understand it, the lines of the station grounds were not changed after

March 17th. On April 14th an agent of the defendant company came to Storm Lake, and had a conference with the citizens' committee with reference to the location of its line of road. This agent explained to the committee just what he wanted, and it happened by design or accident that he wanted part of the same ground which the committee had agreed to procure for the plaintiff. Nothing was said at this first meeting about that matter, however. There is a controversy about what was said thereafter, but we think the evidence fairly shows that defendant was informed regarding the surveys made for plaintiff's line and depot grounds. One Metcalf was the owner of part of the land on which plaintiff's depot and station grounds were located, but he had given the citizens' committee no authority to make contracts for the sale of his property, nor conferred upon them any right to contract on his behalf with either of the railway companies. On April 15th defendant's right of way agent went to Metcalf, and took an option from him for the purchase of a strip of land 200 feet wide for defendant's station grounds, and 100 feet wide for its right of way, crossing the grounds theretofore surveyed by plaintiff for its depot and station grounds. On April 17th an arrangement was made whereby Metcalf and wife conveyed this strip of land to the defendant, but the deed was deposited in escrow in a bank at Storm Lake. Later in the day, however, the deed was actually delivered to the agent of the defendant company, and Brown, who theretofore had held possession thereof as agent for the bank, agreed to be responsible for the consideration, to wit, \$2,000. This deed was filed for record April 25, 1899, but the consideration was not paid when the preliminary injunction was issued by Judge Helsell. On April 19th defendant commenced grading across the ground staked out by the plaintiff as its station grounds, and in three days had established a grade about 1,400 feet in length, on which a track was laid. This track was not connected with any other at the time this action was commenced, and it may be taken for granted, we think, that this grading and track laying was for the purpose of securing some advantage over the plaintiff. On April 20th plaintiff instituted proceedings to condemn a strip 100 feet wide along the line finally staked out by it, and over and across the Metcalf land, part of which had theretofore been secured by defendant as before stated. The papers filed in those proceedings describe the land occupied by defendant and claimed by it as its right of way at the point of intersection. Notice of the appraisal of damage was served on Metcalf alone. At that time the records showed the legal title to the property to be in Metcalf, and plaintiff insists that it had no notice, either actual or constructive, of the option or of the deed made by Metcalf to the defendant. May 3d the commissioners made their award, and on May 9th plaintiff paid the amount of the award to the sheriff, which, on May 20th, was accepted by Met-

calf, although he had theretofore conveyed the land to the plaintiff, as will hereafter appear. May 22d the proceedings in condemnation were duly recorded as provided by law. On April 21st, Metcalf sold plaintiff that part of his premises on which defendant's track was built, the deed expressing a consideration of \$500. This deed was filed for record April 22d, and on April 21st Metcalf and wife conveyed by quitclaim deed the land theretofore conveyed to defendant for the expressed consideration of \$2,000. This deed was also filed for record April 22d. Plaintiff claims that it acquired these deeds in good faith, and without notice or knowledge of the conveyance to the defendant. After defendant recorded its deed, plaintiff commenced condemnation proceedings against it, and secured an award, which was deposited with the sheriff; but defendant insists that this award is invalid because of insufficiency of the service of notice. Thereafter, and on October 6th, plaintiff instituted another condemnation proceeding against defendant. At defendant's instance an injunction was issued restraining these proceedings, but, as the notice thereof did not reach the sheriff in time, an award was made, and the amount thereof deposited with the sheriff. July 19, 1899, plaintiff, on application to Judge Helsell, secured a temporary writ of injunction restraining defendant from constructing its line over plaintiff's station grounds, from continuing or maintaining any railroad grade thereon, from interfering with plaintiff in the exclusive use and occupancy thereof, and from establishing a grade crossing on the property. This writ, as will be noticed, was mandatory in character, and was issued without notice to the defendant. The petition on which it was granted was filed July 20th, and it asked that the injunction be made permanent, that plaintiff be adjudged to have priority of right to the right of way and station grounds theretofore staked out by it, and that defendant's rights be adjudged inferior to those of plaintiff, and subject to all duties imposed by law where one railway crosses another. The temporary writ was dissolved by Judge Quarton on defendant's motion, and plaintiff appealed. This appeal was ordered submitted with the appeal in the main case, but, as it presents some questions foreign to those raised on the appeal in the main case, it will first be disposed of.

As defendant's grade and track were established and laid when the action was commenced, and as defendant was in the actual possession of the property, the injunction was mandatory in character, and had the effect of transferring the possession of the property from defendant to the plaintiff. That this is not the office of a temporary writ is well established, and it follows that the injunction was improvidently granted, and should have been dissolved. The authorities seem to be almost unanimous on this proposition. Beach, Inj. § 112; High, Inj. (2d Ed.) § 601; Farmers' R. Co. v. Reno, O. C. & P. Ry. Co., 53 Pa. 224; Calvert v. State (Neb.) 52 N. W. 687;

Arnold v. Bright, 41 Mich. 207, 2 N. W. 16. Moreover, if the action was simply to stop defendant from proceeding with its work of building the road, or its operation of the part already constructed, it should not have been issued without notice. Code, § 4359. The action of the court may also be sustained on the theory that no great or irreparable injury to plaintiff's property was threatened. Dubuque & S. C. Ry. Co. v. Cedar Falls & M. Ry. Co., 76 Iowa, 702, 39 N. W. 691. The ruling on the motion to dissolve was clearly correct.

2. We come now to the main case, and need hardly say, in view of the preceding statement, that the case is one where two rival companies are seeking to secure an advantage in the acquisition of their rights of way and depot grounds. Plaintiff not only claims title and a prior right to the strip of ground selected for depot and station purposes agreed to be conveyed to it by the citizens' committee, but also to a right of way 100 feet wide, extending over the same ground, acquired through condemnation proceedings; while defendant insists that it acquired a prior right to the crossing over plaintiff's alleged right of way and depot grounds through its deed from Metcalf. At the time the transactions above recited transpired, a railway could not acquire by condemnation a strip to exceed 100 feet in width (Code, § 1995), and for this reason plaintiff attempted to purchase the land desired by it for a station and depot grounds. The citizens' committee with which it negotiated represented the people generally, but had no authority from the owners of the land over which plaintiff's line was surveyed,—at least it had no authority from Metcalf. Plaintiff's surveys were not primarily for the purpose of condemnation, but to define the location and limits of the land it sought to acquire. As we shall hereafter show, plaintiff did not commence its condemnation proceedings until after defendant had acquired its option from Metcalf, and had actually entered upon and graded its line over the strip of ground in controversy. We have, then, to deal in the first instance with the contract rights of the parties. Defendant acquired its option from Metcalf on April 15th, secured the delivery of his deed on the 17th, and commenced work on the property April 19th. On April 21st Metcalf transferred the land claimed by the defendant for a crossing, and on the same day quitclaimed all that had previously been sold to the defendant to the plaintiff. Defendant did not record its deed until April 25th, while plaintiff recorded its deeds on April 22d. Defendant's title seems prior in point of time, but plaintiff insists that the deed to defendant was not delivered; that it was not paid for when delivered; that it was delivered without authority; that it was not recorded until the 25th, and not paid for until after May 9th; and that it purchased without notice of defendant's title. As the deed was actually delivered to the defendant, it could not be held in escrow. True, the consideration was not then paid, but Metcalf, the

grantor, consented to the delivery on Brown's guaranty that he would see the price paid. There was no fraud in securing the delivery of the instrument, and nonpayment of the purchase price will not, under the circumstances, defeat it. *Gardner v. Early*, 72 Iowa, 522, 34 N. W. 311. Metcalf testified that he delivered the deed intending that it should become operative, and it certainly conveyed the title of the property to the defendant. Plaintiff says, however, that its subsequent purchase was for value, and without notice. There is no evidence to support this contention, aside from the consideration expressed in the deeds from Metcalf to plaintiff; and the deeds were not of bargain and sale, but quitclaims. The recitals in these deeds are not sufficient evidence of the payment of a consideration. *Sillyman v. King*, 36 Iowa, 207; *Gardner v. Early*, supra; *Nolan v. Grant*, 53 Iowa, 392, 5 N. W. 531. This alone would be a sufficient answer to the plaintiff's claim under the contract; but, as it took a quitclaim deed, it is not protected in any event. *Steele v. Bank*, 79 Iowa, 347, 44 N. W. 564, 7 L. R. A. 524, 18 Am. St. Rep. 370, and cases cited. Further than this, it is expressly admitted that when plaintiff took its quitclaim deed it had notice of the option and of the deed to the defendant company. Moreover, defendant was in the actual possession of the property when plaintiff received its deeds. Having now disposed of the contract rights of the parties, we turn to the condemnation proceedings.

3. As hitherto stated, we do not think any of the preliminary surveys were made for the purposes of condemnation. Plaintiff could not condemn the strip of ground marked out, for it was wider than the law permitted to be taken through condemnation. We are convinced, after reading the record, that plaintiff was relying on its contract with the citizens' committee, until after it discovered that defendant had obtained an option and deed for the land. Discovering these facts it instituted its proceedings on April 20th against Metcalf, defendant's grantor. At that time defendant was in possession of the property, and had made some improvements thereon. Of course, defendant was not bound by these proceedings. After defendant's deed was recorded, plaintiff, on May 3d, commenced further proceedings against defendant, but the notice was not served on any agent of the defendant, as we understand it. Plaintiff contends that these proceedings relate back to the time the preliminary survey was made, or to the time when plaintiff selected the line for its right of way. It will not be seriously contended, we think, that the mere determination of the general manager or president of a railway to build its line over a particular tract of ground is the commencement of condemnation proceedings. The most that can be claimed is that this determination, followed by an actual survey and staking out of the route selected, is a sufficient appropriation of the land to give plaintiff a prior

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right thereto. There is really no need to consider this proposition, for we are firmly convinced that this survey was not preliminary to condemnation proceedings, but was had for the purpose of indicating the land plaintiff desired to acquire for depot and station purposes. As already stated, the condemnation proceedings to acquire a right of way 100 feet in width were not begun until after defendant had obtained its deed and entered into the possession of the land. In many states the staking out and surveying of a line of road is held to be the beginning of condemnation proceedings, and, if followed up, give prior title or right to the line so located over purchasers with notice. *Railroad Co. v. Moss*, 23 Cal. 324; *Railroad Co. v. Blair*, 9 N. J. Eq. 635; *Barre R. Co. v. Montpelier & W. R. R. Co. (Vt.)* 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877; *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. (Pa.)* 21 Atl. 645, 12 L. R. A. 220. Despite what is said by counsel of *Railroad Co. v. Grinnell*, 51 Iowa, 482, 1 N. W. 712, we are of opinion that the question has never heretofore been presented to this court. That case involved the construction of a land grant by congress, and has no reference whatever to condemnation proceedings. Judge Shiras, of the federal court, had occasion to consider the point in some of its phases, as will be seen by reference to *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. (C. C.)* 27 Fed. 771. But in that case the party claiming under the condemnation proceedings had filed its application with the sheriff at the time the other party acquired title by purchase. If the statute does not provide for nor require a survey or location, nor require a map or survey to be recorded, that company which first commences condemnation proceedings will have priority of right to appropriate the land. *Mills*, Em. Dom. § 306; 3 Elliott, R. R. p. 1277; 2 Lewis, Em. Dom. (2d Ed.) p. 753, and cases cited. In this state no location or survey is necessary; nor does the statute require the filing of any map or survey. If this, then, be the rule,—as we are inclined to think it is,—defendant acquired its rights by purchase before plaintiff commenced its condemnation proceedings. The statute to which we have referred authorizes railway companies to condemn land “for the location, construction, and convenient use of its road.” This language is significant. The condemnation is for the “location of the road,” etc. Until condemnation is had, or at least commenced, the railway company is a trespasser when it enters on the land of the owner. Surely, an unauthorized trespass will not give it a prior right to the land. Aside from this, however, the controversy is over a crossing, and not over the entire strip used or claimed by either party. If by condemnation plaintiff acquired a prior right to but 100 feet of ground for its right of way, defendant had the right to cross this strip, unless in so doing it materially interfered with the use of the strip and the operation of trains thereon. Railway

Co. v. Starkweather, 97 Iowa, 159, 66 N. W. 87, 31 L. R. A. 183, 59 Am. St. Rep. 404. This would be true even if plaintiff had acquired a sufficient strip for depot purposes. But that it did not do, for it could not acquire a strip exceeding 100 feet in width. The case, in this aspect, is no different then from the ordinary one where one railway is seeking to cross the line of another. That being true, plaintiff had no right to the relief sought in this action. Had plaintiff actually constructed its line,—which it had not at the time when defendant took possession,—and thrown up its grade, defendant would have had the right under the law to cross it. The question then would be one of damages, and various other matters which arise in such cases, rather than of priority of right. The questions which arise regarding the manner of crossing, etc., are not involved on this appeal. We may say, however, that priority of construction has much to do with the manner of crossing and the respective rights of the parties with reference thereto. *St. Louis, I. M. & S. Ry. v. Peach Orchard & G. R. Co.*, 42 Ark. 249; *Lewis, Em. Dom.* (Last Ed.) p. 757. It must constantly be borne in mind that under no possible theory of the case did plaintiff obtain title to more than a strip 100 feet in width when defendant obtained its title through purchase; hence the question of depot grounds is not in the case, when viewed from the standpoint of right under the condemnation proceedings. Treating the case as one where defendant has simply crossed a surveyed line of road, and granting that his survey gave a prior right of occupancy, it does not follow that defendant is not entitled to cross it, or that any damage results if it does so. Indeed, plaintiff does not contend, as we understand it, that any damage resulted from crossing the surveyed line, which could not exceed, when fully appropriated, more than 100 feet in width. See Code, §§ 2020, 2063. We are of opinion, however, that when defendant obtained its deed from Metcalf plaintiff had not acquired a right of way or such a claim thereto as would inhibit defendant from crossing the same. Indeed, we are constrained to hold that it did not commence its condemnation proceedings until after defendant had obtained title. All that preceded was with reference to the purchase of the land, and defendant, by its diligence, obtained a superior title to the strip in dispute.

With reference to the condemnation proceedings actually instituted against Metcalf and the defendant, a few words may not be out of place, although what we have said seems to dispose of the main points in the case. From the foregoing it will be observed that plaintiff finally obtained title by deed from Metcalf, and virtually abandoned its proceedings against him. The award was made after plaintiff had obtained title to the land by deed. The title was manifestly acquired either by deed or by condemnation,—not by both,—and, as it took its deed before the award was made and paid, it must be held

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to have acquired its title, in so far as Metcalf is concerned, by deed. Aside from this, however, there was no refusal on the part of Metcalf to make a deed, and no disagreement as to compensation to be paid; hence the proceedings were without jurisdiction. *Railway Co. v. Bentley*, 62 Iowa, 446, 17 N. W. 668. That case seems to effectually dispose of the Metcalf condemnation proceedings. The proceedings against the defendant need not be considered, although it may be stated that they seem to have been without jurisdiction for want of notice. That question we do not care to definitely pronounce upon, however, at this time, and simply refer to it in order that it may not appear to have been overlooked.

Something is said about a highway at the point of crossing. That question is not regarded as material in view of what precedes.

We have now disposed of all the claims made in the case, except that of bad faith. The evidence, as we have said, discloses the usual race for priority, and perhaps some little juggling with truth; but the record is not such as to justify us in holding that from this alone plaintiff's rights should be held superior to those of defendant.

We are satisfied with the conclusion reached by the trial court, and the cases are on both appeals affirmed.

SOUTHERN RY. CO. IN MISSISSIPPI *v.* BRISTER *et al.*

(*Supreme Court of Mississippi*, Nov. 26, 1901.)

[31 S. E. Rep. 440.]

Railroads—Train Master—Authority—Employment of Surgeon.*

In an action against a railroad by a physician for services rendered in caring for a railroad employee who was desperately wounded and had lain for several hours without medical aid, it appeared that the train master, who was shown, without contradiction, to be acting as local superintendent, told such physician to take charge of the case for a certain fee. The railroad had regular surgeons in employ, but none were within call at the time: *held*, that such train master, as superintendent, had authority to employ a physician, so that the railroad was liable for the services rendered.

Appeal from circuit court, Leflore county; F. E. Larkin, Judge.

"To be officially reported."

Action by Brister & Humphries against the Southern Railway Company in Mississippi. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Catchings & Catchings, for appellant.

Gwin & Mounger, for appellees.

*As to the authority of railway officers and employees to bind the company by contracts for medical services, see *Adams v. Southern Ry. Co.* (N. Car.), 16 Am. & Eng. R. Cas., N. S., 369, and notes, 370 et seq.

TERRAL, J. This is a suit by Drs. Brister & Humphries, physicians and surgeons, against the Southern Railway Company in Mississippi for services to Asbery Crosby, an employee of said company. On the 30th of October, 1900, Crosby, an employee of the company, while engaged in its service, was run over by one of its trains, and was seriously, and, as it soon proved, fatally, injured. The injury happened at or near Greenwood, Miss., and, Crosby being in Greenwood, De Hart, the company's station agent there, sent a call to Dr. Humphries, whose services in like cases the company had before refused to compensate; and he informed De Hart that he would attend the injured employee if De Hart would be responsible for the fee. De Hart asked him to wait a little, and, as we infer, placed the case before the train master, Francis, who wired Dr. Humphries to take charge of the case for the fee of \$100, unless he was appointed the company's surgeon. Dr. Humphries attended the wounded man, gave him all necessary medical attention, and procured and paid for other necessary care and nursing of him, and after a few hours the patient died. The company not having engaged Dr. Humphries as one of its surgeons, he brought suit for the agreed fee of \$100, and recovered a judgment therefor, and from the judgment the company appeals.

The record discloses that plaintiffs below proved their contract with Francis for the payment of the fee of \$100, their performance of their part of the contract, and the breach by the defendant. They also proved by Mr. Dunn, a former employee of the defendant, that he knew Francis, the train master, and that he had authority in emergencies to employ a surgeon temporarily, and that Francis also acted under the superintendent, and performed the duties of local superintendent. This evidence was not objected to or controverted. So far as we can gather from the record, De Hart was the only officer of the company immediately on the spot. He evidently referred the matter to Francis, who, we must presume, was the next officer of authority within reach, and who had the means of knowing all that De Hart knew about the case, as Crosby was in the room of the depot, and with him the contract was made for the company. The company had surgeons in employ, but they were not in call. From that fact we infer the company recognizes its duty to employees injured in its service. Now, it is admitted that Francis might, perhaps, employ a surgeon in an emergency; and Crosby was desperately wounded, and had lain some hours without surgical aid, and no emergency to him to have a surgeon could be greater. We incline to the view that under the circumstances of this case, and upon the evidence contained in the record, Francis had authority to bind the company, and the contract made was valid and enforceable. In *Railroad Co. v. Thomas*, 19 Kan. 256, 20 L. R. A. 696, note, it was held that a division superintendent will be presumed

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to have authority to employ a physician to attend an employee who has been injured while in the service of the company. Whether Francis, as train master, had authority to contract with Dr. Humphries as he did, we are not here called to decide; but, inasmuch as at the time he was in the exercise of the functions of a division or local superintendent over that part of the road, we think it may be presumed that he had the power to so contract. Moreover, Dunn testified that Francis had such authority, and his testimony is not controverted or denied. This evidence, of itself, was sufficient to support the verdict.

Affirmed.

HOMANS v. BOSTON ELEVATED RY. CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, Feb. 27, 1902.*)

[62 N. E. Rep. 737.]

Personal Injuries—Nervous Shock—Element of Damages.*

Plaintiff, while in one of defendant's cars was thrown against a seat, receiving a slight blow, in consequence of a collision for which defendant was to blame; and afterwards had a good deal of suffering of a hysterical nature: *held*, that plaintiff could recover for the shock if resulting from a jar to her nervous system which accompanied the blow to her person, and was not required to show that the shock was the consequence of the blow, it being assumed that the jar was due to the same cause as the blow.

Exceptions from superior court, Suffolk county.

Action by one Homans against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant brings exceptions. Overruled.

Marcellus Coggan, for plaintiff.

P. H. Cooney and A. I. Peckham, for defendant.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was in one of the defendant's cars and was thrown against a seat, receiving a slight blow, in consequence of a collision for which the defendant was to blame. She afterwards had a good deal of suffering of a hysterical nature, and the question before us on the exceptions concerns the rule of liability for the nervous shock. It was decided in *Spade v. Railroad Co.*, 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298, that, if the defendant was a wrongdoer, it must answer for the actual consequences of the battery to the plaintiff as she was, although she might be abnormally nervous. It also was decided, however, that if a nervous shock was due to causes for which the defendant was not answerable, such as the behavior of a drunken man whom it was engaged in removing, it could not be held for the shock notwithstanding its liability for a battery happening at the

*See *Yerkes v. Northern Pac. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 642, and foot-note, 643.

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same time. The defendant by various requests tried to press the latter principle so far as to require the plaintiff to prove that the nervous shock was the consequence of the battery, whereas the judge allowed her to recover for a shock ending in paralysis if it resulted from a jar to her nervous system which accompanied the blow to her person. It was understood of course that the jar was due to the same cause as the blow, and both to the defendant's fault.

We are of opinion that the judge was right and that further refining would be wrong. As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. *Spade v. Railroad Co.*, 168 Mass. 285, 288, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; *Smith v. Cable Co.*, 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374. But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guarantied by proof of a substantial battery of the person there is no occasion to press further the exception to general rules. The difference between this case and the *Spade Case* in its second presentation is that in the latter the defendant's wrong, if any, began with the battery and it was not responsible for the previous sources of fear, whereas here the defendant was responsible for the trouble throughout. The decisions, although not explicit, favor the conclusion to which we have come. *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Warren v. Railroad Co.*, 163 Mass. 484, 487, 40 N. E. 895.

Exceptions overruled.

WILBUR v. CEDAR RAPIDS & M. R. RY. CO. *et al.*

(*Supreme Court of Iowa, Feb. 12, 1902.*)

[89 N. W. Rep. 101.]

Whether Homestead Entry Was within Railroad Grant.

A letter from the commissioner of the general land office to the register of a land office, stating that cancellation of homestead entry was because of its conflict with selections under a grant to a railroad, is hearsay; the records of the department of the interior being necessary to show that the land was within the grant.

Adverse Possession of Land Acquired by Railroad from Government.*

Though plaintiff entered on land as a homestead claim, his possession

*As to whether title may be acquired against a railroad by adverse possession, see *Pittsburgh, etc., Ry. Co. v. Stickley* (Ind.), 20 Am. & Eng. R. Cas., N. S., 148, and note, 151 et seq.

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after title was passed by the government to a railroad and the entry was canceled will be held adverse, he having fenced the land, cultivated what was suitable for wheat, used the remainder for other purposes, planted an orchard, erected a new house, and paid taxes.

Appeal from district court, Hamilton county; P. B. Birdsall, Judge.

Action to quiet title. The cross petition demanded the same relief. Decree was entered quieting title in plaintiff, and defendants appeal. Affirmed.

Charles A. Clark & Son and Wm. G. Clark, for appellants.
D. C. Chase, for appellee.

LADD, C. J. One Devore took possession of the 40 acres of land in controversy by hauling logs on it in 1864, and the year following built a log house and broke 27 acres. He occupied it as a claim merely until the fall of 1866, when he sold out to plaintiff on the condition of the latter being able to enter it as a homestead. The consideration was \$200, for which a receipt was given, but no conveyance was executed. Plaintiff took possession immediately, knowing title to be in the United States, and continued in the open and exclusive occupancy of the land until the spring of 1899,—more than 32 years. Soon after going into possession he fenced and ditched the land and built a granary and a stable thereon. Later he set out an orchard and grove, and 14 years ago erected a dwelling house thereon at a cost of \$600. In February, 1867, he entered the 40 as a government homestead, taking the receiver's receipt for \$14. This was canceled by the commissioner of the general land office March 23, 1869, as being in conflict with selections made by the Cedar Rapids & Missouri River Railroad Company under the land grant of congress approved May 15, 1856, as amended June 2, 1864. The register of the local office at Ft. Dodge was promptly advised of this action, but for some reason plaintiff was not notified until 1871. He made no application to have the entry reinstated, nor did he contest the ruling in any way. In the meantime—April 20, 1869—this with other lands was certified by the secretary of interior to said railroad company, and was by it conveyed to the Iowa Railroad Land Company by quitclaim deed, September 15, 1869, which was recorded a year later. When this land was selected by the railroad company we have no definite means of knowing. The map of the modified line filed in the general land office undoubtedly pointed out all land within the six-mile limit, and tracts beyond that must have been selected in order to detach from the public domain subject to homestead entry. *Railroad Co. v. Herring*, 110 U. S. 27, 3 Sup. Ct. 485, 28 L. Ed. 56; *Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. 362, 36 L. Ed. 64. True, it is stated in the letter to the receiver at Ft. Dodge that the cancellation of homestead entry was because of its conflict with selections made under the grant, but this is in the nature of hearsay, and not competent to show what was in fact done. Indeed, the

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approval of the list including this land does not appear to have been made by the secretary of interior until April 20, 1869. If this 40 was within the place limits, or had been selected in lieu of that lost therein from the indemnity lands, the record of the department of the interior so indicated, and an exemplification of such record was necessary to establish the fact. Indeed, as this tract is in Hamilton county, and under the act of congress the company was bound to construct the road through Boonsboro, Boone county, it may well be suspected that this 40 is within the indemnity limits. But on this point, as said, there is no proper evidence, and the record does not indicate the tract to have been withdrawn from that portion of the public domain subject to homestead entry prior to its actual certification. The cancellation of the homestead entry was without notice to plaintiff, and as the result of an ex parte proceeding. The fees by him paid were not returned. He had been in possession in compliance with the homestead law nearly four years before receiving notice of the action of commissioner, and the cancellation of his entry without an opportunity of being heard is entitled to little or no weight as an adjudication. The necessity of notice in such cases is clearly recognized in *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772. This much is said not to question but that the government passed the legal title to defendant's grantor, but to show that there is some basis for the plaintiff's claim of right under which he has been in possession. See *Bisson v. Curry*, 35 Iowa, 72. True, the statute of limitations did not run as against the government, but nevertheless an individual may claim adversely to the United States. *Railway v. Allfree*, 64 Iowa, 500, 20 N. W. 779. The record of the defendant's deed charged him with notice that it, and not the government, held the legal title, and his possession thereupon ceased to be subservient to that of the government. He was in possession for 30 years thereafter, during which time defendant indicated its intention in no other way than by paying the taxes from 1870 to 1875 and from 1881 to 1885. In his testimony plaintiff referred to the title as his, and declared nobody had questioned it in any proceeding for 30 years. He fenced the land soon after taking possession, cultivated that suitable for wheat purposes continually, and used the remainder for other purposes. Trees were planted nearly every year during his occupancy, and an orchard many years ago. In 1885 he erected a new house, and has paid all the taxes for the last 13 years. Continuous and uninterrupted possession will not alone establish a claim of right; neither will payment of taxes; but when, with these circumstances, it also appears that the party has set out trees, erected a house and outbuildings, inclosed the premises by fence, cultivated the land, and in all respects treated it precisely as his own, a claim of right may be inferred, and treated

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as fully established as though shown by oral declarations of such claim. As said in *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441, "A claim of title may be made by acts alone quite as effectually as by the most emphatic assertions." In *Magee v. Magee*, 37 Miss. 138, there was no avowed claim of right, but the court held this might be inferred from the acts of those in occupancy; saying, "In old and thickly populated countries, 'digging stones or turfs, as in England, with an occasional cutting of timber, are acts of ownership, from which the jury may infer an adverse holding.' Almost everywhere it is held that actual cultivation of the soil and the erection of permanent and valuable improvements are circumstances from which the same conclusions may legitimately be drawn." Again, in *James v. Railroad Co.*, 91 Ill. 554: "No mere words could more satisfactorily assert that the defendant claimed title than continued exercise of acts of ownership over the property for a period of more than 20 years. Using and controlling property as owner is the ordinary mode of asserting a claim of title, and, indeed, is the only proof of which a claim of title to a very large proportion of property is susceptible." See, also, *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835. We think the circumstances proven fully warranted the court in inferring the *quo animo* of the plaintiff in retaining and occupying the land in controversy. The intention with which property has been held is, as often declared, the test of adverse possession, and, notwithstanding this was originally taken as subservient to the government's title, we think that it may be fairly found that subsequent to the time legal title passed to defendant, in the light of the facts stated, the claim of right was asserted as against all the world, and that the plaintiff was entitled to the relief granted. See *Cole v. Railroad Co.*, 76 Iowa, 185, 40 N. W. 711; *Schlawig v. Purslow*, 8 C. C. A. 315, 59 Fed. 848. The facts distinguish the case from *Bellows v. Todd*, 39 Iowa, 209, and *Litchfield v. Sewell*, 97 Iowa, 247, 66 N. W. 104.

Affirmed.

ATKINS *et al.* v. SHREVEPORT & R. R. V. Ry. Co.

(*Supreme Court of Louisiana, Nov. 18, 1901.*)

[31 So. Rep. 166.]

Railroad Aid Grant—Clause Requiring Company to Operate Towboats.

A clause in a contract evidencing the grant of aid to a railway company, which is to construct a line of road on the east side of Red river, that the company shall operate towboats, with convenient barges, at points on the river, so as to furnish transportation to freight and produce, and to operate the boats as low downstream as the lower boundary line of the parish granting the aid, is held to mean that the railway company should run a boat or boats, towing barges, when necessary, in seasons of low water, up and down the river front of the parish, making frequent connection with the railroad at the points in the parish where the railroad touched the river, to the end of giving the people of the

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parish living on the river, especially those on the west bank, direct, easy, and continuous connection with the railroad.

Same—Same—Ultra Vires.*

It was altogether competent and legal for the railroad company to stipulate to do this. There is nothing of ultra vires character about it.

Same—Same—Same—Estoppel.

Besides, if the stipulation was not intra vires, it does not lie in the mouth of the railway company, which received the aid, to set the same up as defense.

Same—Same—Construction.

Such a stipulation is a consideration of the grant. It is more. It is a material consideration; and the railway company fails to earn the tax whenever it fails to meet the condition.

Same—Same.

The obligation of the railway company in this regard is not fulfilled by a contract with a boat already in the river, making fortnightly trips from New Orleans to Shreveport, to receive and transport such freight and produce as may be offered for shipment.

Same—Same.

Since the railway could earn the tax only by running boats agreeably to the intent of the contract, a putting in mora was not required.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by J. B. Atkins and others against the Shreveport & Red River Valley Railway Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Sutherlin & Hall and Egan & Scheen, for appellants.

Leonard, Randolph & Rendall and Alexander & Wilkinson, for appellee.

BLANCHARD, J. Certain taxpayers of the parish of Red River, for themselves, and the police jury of the parish, for the body of the tax payers, bring this action to have declared forfeited a special tax of five mills voted by the property tax payers of the parish in aid of the defendant company. The ground for this demand of forfeiture is the nonfulfillment of the conditions attached to the grant. In the year 1897 petitions addressed to the police jury were circulated throughout the parish, praying that body to submit to the property tax payers a proposition to vote the tax. It is averred by plaintiffs that these petitions were gotten up and circulated by the defendant company. This, however, is not of much moment. The law required at least one-third of the property tax payers of the parish should sign the petition before the police jury could act. The requisite number having signed, the jury adopted an ordinance submitting the proposition to the property tax payers at an election called for the purpose, and at this election, held on the 23d of September, 1897, a majority in number and in amount or value of property voted in favor of the tax. Following this the jury and the railway company entered into a formal contract, the first obligating itself to extend upon the assessment rolls of the parish the tax of five

*See 5 Rap. & Mack's Dig. 835 et seq.

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mills for ten years in favor of the second, and the latter obligating itself to build and operate the line of road in aid of which the tax was voted. In this contract the petition of tax payers aforesaid is referred to as containing the reciprocal obligations of the contracting parties, and a copy of the petition is annexed to and made part of the contract. Following the execution of the instrument evidencing this contract, the police jury adopted an ordinance levying the tax and ordering its collection.

As the petition of taxpayers to the police jury, praying the submission of the proposition to vote the tax, was the initial step required by law in the movement to grant the aid, and as this petition contains the terms and conditions upon which the grant was to be made, we copy the same, as follows: "The undersigned petitioners, constituting more than one-third of the property tax payers of the parish of Red River, state of Louisiana, with respect represent that the construction of the Shreveport & Red River Valley Railroad by the Shreveport & Red River Valley Railway Company, a corporation duly organized under the laws of Louisiana, from the city of Shreveport, * * * on a line intersecting the northern boundary of said parish of Red River, and running thence in a southerly direction to within the incorporated limits of the town of Coushatta, * * * said town being the terminus of said road,—said road to be constructed of the best material of modern equipment,—will be of great benefit to the people and property of said parish of Red River. We therefore * * * respectfully pray that your honorable body will levy a special tax of five mills annually for a period of ten years in aid of said Shreveport & Red River Valley Railway Company, commencing January 1, 1898, and said tax to be levied for the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, and 1907: Provided, that this tax is voted and to be levied under the following conditions, to wit: That said Shreveport & Red River Valley Railway Company shall commence work on the construction of said railroad from the said city of Shreveport within 30 days after the promulgation of a favorable vote taken hereon, and shall fully complete and put in operation said railroad from said city of Shreveport to within the corporation limits of the said town of Coushatta within 12 months from the promulgation of said favorable vote taken hereon, and shall continuously operate through trains on said road, unless prevented by war, overflow, labor strikes, or other unforeseen fortuitous events, and no part of said tax to be paid said company until the completion and operation of trains thereon; provided, further, that said Shreveport & Red River Valley Railway Company shall operate towboats or steam tugs, with convenient barges, at such points on the stream of Red river as to furnish transportation of such freight and agricultural products as may be assembled at such points, and to operate such boats or steam tugs, with convenient

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barges, as low down said stream of Red river as the present site of Lake End, La. Your petitioners further pray your honorable body to order an election according to law to take the sense of the property tax payers on said proposition for or against said proposed aid; the ballots to be used at said election to be written or printed in the following form, viz.: 'For a special tax of 5 mills in aid of the Shreveport & Red River Valley Railway Company, for the time and on the conditions set forth in the petition of the property tax payers.' 'Against the special tax of 5 mills in aid of the Shreveport & Red River Valley Railway Company, for the time and on the conditions set forth in the petition of the property tax payers,'—with the name of the voter and the value of his assessed property written on each ballot. And for which we will ever pray," etc.

The special election at which the tax was voted was held and conducted in all respects as thus petitioned for. The railway company completed the road to Coushatta and put the same in operation within the time named in the petition. The line was inspected by the police jury, and that body, by formal ordinance passed on November 23, 1898, accepted the road and instructed the tax collector to pay over to the company "the special tax levied in aid of the construction thereof, as provided by law, as long as said company continue to comply with their contract." It appears that this tax for the years 1898 and 1899 has been paid to the company. The present suit was filed September 10, 1900, and decided in the lower court March 9, 1901. The decision was adverse to the plaintiffs, and they prosecute this appeal.

The contention of the appellants is that the conditions upon which the tax was voted that have not been fulfilled are: (1) The town of Coushatta was stipulated to be the terminus of the line, whereas, in point of fact, the road, after reaching Coushatta, passed on southward into and through other parishes than the parish of Red River, and has made some point other than Coushatta its terminus. (2) The company undertook to operate, in connection with the railway, boats or tugs, with barges, on the river, for the convenience of shippers and receivers of freight, which stipulation has not been met and fulfilled, at least not so since the latter part of February, 1899, at which time a boat, the *Uni*, owned and operated by the railway company, was destroyed by fire. It is insisted that, these being essential and continuing conditions of the grant, the failure to meet them operates the forfeiture of the tax.

As to the demand of the police jury, the defendant filed an exception of no cause of action. The contention in this regard is that the jury has no right to bring the suit or stand in judgment therein; that it has no public function to perform in connection with the suit, and no interest in the controversy; that, when it levied the tax, it performed the specific duty imposed upon it by law; and that thereafter its connection

with, and legal duty towards, the tax ceased. Defendant also pleaded, as against that part of the plaintiffs' demand founded upon failure to operate towboats in the river, that the petition does not allege there had been a putting in mora. In this connection, it is urged that demand upon defendant—a putting in default—was a prerequisite to the institution of the suit. Reserving its exceptions, it answered, denying that it was one of the conditions of the contract that Coushatta was to be the terminus of the railway. It averred that the material and sufficient consideration for the grant was the construction of the road from Shreveport to Coushatta within the time agreed upon, and the continuous operation of its trains thereon since that time, both of which are affirmed. It charged that the stipulation as to the operation of towboats was not *intra vires*, nor a material consideration, but that, should it be held material, then it has been fully complied with.

We do not find it necessary to pass upon the exception challenging the right of the police jury to appear as party plaintiff in the suit. Undoubtedly, taxpayers in interest have a standing in court to bring the action, and certain of them have done so. 1 Thomp. Corp. § 1130. All the points raised may be adjudicated as well with them as sole plaintiff as could be the case were the jury a coplaintiff.

The contract between the people of Red River parish and the railway company had for its object, on part of the people, the construction and operation of the railway into the parish and to the county seat, and, on part of the company, the obtaining of financial aid by means of the tax in furtherance of the construction of the road. But this was not all. The people had the right to attach other conditions to this grant of the tax, and did so; and the railway company agreed to these conditions, and, in order to earn the tax, it must meet the same year by year during the term, at least, for which the tax was voted. In the ordinance passed by the police jury, accepting the road and instructing the tax collector to pay over the avails of the tax to the company, it is specially stipulated that this "paying over" was to take place "as long as said company continues to comply with their contract." This meant, and could only mean, that the tax was to be paid over each year, as collected, provided the company met those conditions of the contract which were continuing in character; that is to say, the company had agreed to do something which was to be done after the road was constructed and accepted, and this "something" had to be done, or else the tax was not to be paid over.

We do not think the contract stipulates as a condition of the grant that the town of Coushatta should be and remain the final terminus of the road. True, the town is referred to in the tax payers' petition as being the terminus of the road; but this is held to have been descriptive merely. The tax payers might have made it a condition of the grant, and, had they

done so, and the company had disregarded it, it would be ground for forfeiture of the grant. 2 Elliott, R. R. §§ 856, 862; 1 Beach, Cont. §§ 90, 129, 131; 1 Thomp. Corp. § 1130. The reference to Coushatta as the terminus of the road is found only in the first clause of the petition of tax payers, where it is recited that the construction of the road into the parish and to the town of Coushatta would be, in the opinion of the signers, "of great benefit to the people and property" of the parish. But in that part of the petition following the prayer for the levy of the special tax in aid of the railway, where the conditions of the grant are set forth, no mention is made that Coushatta should be and remain the terminus. The language there used is: "Provided that this tax is voted and to be levied under the following conditions, to wit." Then follow the declarations (1) that work on the construction of the road should commence within 30 days from the Shreveport end of the line, and the road should be completed and put in operation from Shreveport to Coushatta within 12 months, and the company should continuously thereafter operate through trains on the road; and (2) that the railway company should operate towboats or steam tugs, with barges, on the river as far downstream as Lake End, which is a village on the river near the lower boundary line of the parish of Red River. These are, we hold, the two conditions, and the only two, attached to the grant.

The first has been complied with. About this no question is raised. But the tax is not to be considered earned by compliance with one only of the two conditions named. Civ. Code, arts. 2021, 2026, 2028. Every condition must be performed in the manner it is probable that the parties intended it should be. Id. art. 2037; 1 Poth. Obl. 206. Where several conditions are connected by a copulative conjunction, all of them must be accomplished, and, if any one is not so, the obligation fails. Id. 223; Bouv. Law Dict. verbo "Condition." The accomplishment of conditions is indivisible, even when the thing which is the object of the condition is something divisible. 1 Poth. Obl. 215. The effect of a condition is to suspend the obligation until the condition is accomplished. Till then nothing is due. Id. 218. On the failure of any condition to do or not to do, the other party may sue to dissolve the contract. Civ. Code, arts. 1926, 2046. "A railroad company, or one claiming through it, there being no estoppel, must perform the conditions prescribed, or else there can be no effective claim to the aid." 2 Elliott, R. R. § 856. So, too, where the vote is for a subscription upon condition, the railroad company has a right to the voted aid only upon a strict performance of the conditions. Id. § 861, note 4, citing *Brokaw v. Board*, 73 Ind. 543, *Railway Co. v. Thompson*, 24 Kan. 170, and *Chicago, B. & Q. R. Co. v. City of Aurora*, 99 Ill. 205; 1 Thomp. Corp. § 1130. The obligation of the subscriber does not become binding until all conditions have

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been performed. 2 Thomp. Corp. §§ 1332, 1334, 1335, 1344, 1352.

Has the second condition imposed by the tax payers in voting this tax been complied with? To answer this requires the court to construe that part of the petition of tax payers referring to it, to the end of ascertaining its true meaning and intent. The condition is that defendant company "shall operate towboats or steam tugs, with convenient barges, at such points on the stream of Red river as to furnish transportation of such freight and agricultural products as may be assembled at such points, and to operate such boats or steam tugs, with convenient barges, as low down said stream of Red river as the present site of Lake End, La." What was the object of the grantors of the tax in insisting upon this as one of the conditions of the grant? What purpose was the stipulation designed to effectuate? What did the contracting parties mean? What was in their minds at the time this condition was stipulated for by the grantors and agreed to by the grantee? To answer these queries we must look at the situation as it then existed. We must consider the environment of the parties at the time, especially that of the people of Red River parish; and it must be borne in mind that, if anything doubtful or obscure appears in the terms of the contract, the construction should be against the railroad, rather than against the public, for the railroad was the moving party. It sought the public aid. It prepared the contract. *Railway Co. v. Thompson*, 24 Kan. 183.

The parish, physically, is divided by the Red river. The railroad was to be located on the east side of the river. It would run parallel to and near the river, but not on the immediate bank. It would, however, touch the river—that is to say, its bank—at several points in the parish. At these points immediate connection would be made with the river and with boats in the river. Prior to the advent of the railroad the only means of shipment of their produce the people of the parish had was the river. Their only access to the markets of the world for the purchase of supplies and for the sale of their cotton was by means of boats in the river. For years the navigation of the river had been practically monopolized by a single line of boats, owned by a company and known as the "Red River Line," commonly called on the river the "Pool Line." The people wanted competition developed to this line, to the end of securing better freight rates. Therefore they doubly welcomed the coming of the railroad. But a large part of the people of the parish lived on the west side of the river, and a very large part of the valuable property in the parish was located on that side. The proposed tax in aid of the railroad was to be a parish tax,—to be a charge on all the property in the parish. The people and property on the east side of the river would be greatly benefited by the railroad. It would be at their doors. Not so with the people

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and property on the west side. The river intervened between them and the railroad. The direct benefits resulting to them by the construction of the road would not be at all comparable with that received by the people on the east side. Yet the tax was to be voted by all the people. If the taxpayers on the west side were hostile, it was likely the vote on the proposition to grant the aid would be adverse. The railway company recognized this. Everybody did. Something must be done to equalize the benefits to the sections of the parish,—the one, east of the river; the other, west. The only way to do this was to bring the west side in direct touch and connection with the railway. This could be done by the railway company putting a boat or boats in the river to ply along the river front of the parish, making connection with the railway at the points where it touched the river, thus affording the people of the west side an easy access to the railroad, and the people all along the river on both sides of the parish front the benefit of active competition with through boats navigating the river. Under these circumstances the people of the parish and the railway company entered into the contract. The railroad wanted the votes of the taxpayers on the west side. These taxpayers wanted the river navigated by a boat or boats running in connection with the railroad in such way as to enable them to easily reach the railroad. Read in the light of the situation then existing, the meaning and intent of the second condition of the grant is clear. It meant that the railroad company should run a boat or boats, towing barges, when necessary, in seasons of low water, up and down the river front of the parish of Red River, making frequent connection with the railroad at the points or places in the parish where the railroad touched the river, to the end of giving the people of the parish living on the river, especially those on the west bank, direct, easy, and continuous connection with the railroad.

It was clearly intended to give every one in the parish of Red River the use and benefit of the road for which aid was voted. To thus operate a boat to tow barges, so as to carry freight from points on the river to the railroad, is an adjunct to the railroad, would tend to facilitate transportation by rail, and was not beyond the scope of defendant company's charter. It was altogether competent and legal for the railway company to stipulate to do this. There was nothing of ultra vires character about it. It is not reprehensible for a railroad company to own and operate boats in connection with and as feeders to its line of railway. 5 Thomp. Corp. § 5874; 2 Elliott, R. R. § 374, note. Besides, if this stipulation of the contract was not intra vires, it does not lie in the mouth of defendant company to set this up as defense. A railway company, accepting a county subscription as made by the county, accepts it as tendered by the county, with all of its terms and conditions, and is estopped from contending that

such terms and conditions are void and unreasonable. When a contract is not *malum in se*, a party cannot plead *ultra vires* without doing justice and restoring what has been received. 5 Thomp. Corp. § 6003 et seq. The railway company cannot claim the tax and repudiate one of the stipulations upon which the grant was made to it. If it repudiate the transaction at all, it must repudiate it altogether. If it sets up the defense of *ultra vires*, it must restore what it has received of the grant made. Green, Brice, *Ultra Vires* (2d Am. Ed.) p. 717; Reese, *Ultra Vires*, § 74; 2 Elliott, R. R. § 372; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 59, 11 Sup. Ct. 478, 35 L. Ed. 55. Like an infant or married woman, the corporation cannot repudiate and enforce the contract at the same time. Civ. Code, arts. 1792, 1793. The stipulation as to the running of the boats in connection with the railway is held to be a material consideration of the contract, and the railway company cannot earn the tax year by year as it matures without a substantial compliance with it.

Since it could only earn the tax by running the boats, a putting in mora was not required. When the company failed to run the boats according to the intent of its contract, there was what is considered the equivalent of an active violation of the contract, and this rendered demand and putting in default unnecessary. Civ. Code, arts. 1931, 1932, 1933; *Laloire v. Wiltz*, 29 La. Ann. 329; *Solomon v. Gardiner*, 50 La. Ann. 1297, 23 South. 896. Besides, the rule with respect to putting in mora does not apply to contracts depending upon a condition precedent, where no claim for damages for inexecution is made. *Railroad Co. v. Dillard*, 51 La. Ann. 1487, 26 South. 451. The evidence shows defendant company has at no time fully met its obligation in respect to the matter of running boats in the river, and since from about the 1st of March, 1899 (when the boat it had in the river burned), down to the trial of this case in the district court, there has been little better than a pretense of compliance. About the time the police jury accepted the road as constructed, as a compliance with that portion of the contract requiring construction, a boat called the *Uni* was chartered by the company to run in the river in connection with the railroad. Subsequently the company purchased the boat, and ran it until the last of February, 1899, when it was destroyed by fire. The *Uni*, it seems, did not run up and down the river front of the parish, giving the frequent connection with the railroad which, under our interpretation of the contract, should have been done, but continued its trips long distances down the river, sometimes as far as its mouth. These extended trips prevented, of course, that easy and frequent access to railway points on the river within the limits of the parish, by means of boat transportation, which, under the contract, was the due of the people of the parish living on the west side of the river. Nevertheless, such as the service was, it seems to have been

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accepted by the people, and the tax for 1898 and 1899 was paid. Under the view herein expressed, they might well have objected to the service as inadequate under the contract, and declined payment of the tax. But they did not do so. The tax for those years was paid, has been received by the company, and that ends the matter so far as the years 1898 and 1899 are concerned. For the period following 1899 this suit stands as a barrier to the payment of the tax to the company.

After the burning of the Uni there was no effort whatever made of compliance with the towboat requirement until the middle of August following, when what purports to be a contract with the Red River Line was entered into whereby the steamer Scovell of that line was engaged to run "in the waters of the Mississippi and Red river, between the city of New Orleans and the city of Shreveport, or so long as the waters of Red river will permit the navigation to said city of Shreveport, and in low water to operate said steamer as high up the stream of Red river as navigation will permit, and particularly to transport, with convenient barges, etc., such freight and agricultural products as may be assembled at points on the stream of Red river, in the parish of Red River, navigation permitting, to such other points on Red river as the owners and shippers thereof may desire, charging the shippers therefor an equitable and reasonable freightage, to be fixed by the party of the first part [the Red River Line] at a rate which in their judgment is proper and just." Then follows a stipulation that the boat is to be operated in the name of the railroad company, and all bills of lading are to be issued in its name, but the railroad company is to be held harmless against all loss of freight, and harmless against all claims for damages for injuries to passengers or crew, and harmless against all other claims of any nature whatsoever that may arise in the operation and management of the boat, and the steamboat company is to have all the revenues and profits accruing in the operation of the steamer. The only consideration named is the sum of \$1, which is to be paid the steamboat company by the railroad. A bond in the sum of \$15,000 is to be given by the steamboat company to the railroad, conditioned upon the performance of the contract.

The evidence shows that the steamer Scovell was at the time, and had long been, one of the four or five Red River Line boats operating in Red river, and plying between New Orleans and Shreveport, and that after this contract was entered into no difference was perceptible in the running, operation, and management of the boat over what had been the case prior to the signing of the contract, and over what was the case with the other boats of the line, with this exception, that the bills of lading of the Scovell were issued in the name of the railroad, and she was advertised as running under the auspices of the railroad. The boat continued a common carrier on the river, just as she had been for years. Prior to

the contract she would take freight from New Orleans, ascending, or from Shreveport, descending, to way points on the river, and from one way point to another, just as she continued to do after the contract was signed, and her owners continued to enjoy all the profits and stand all the losses of her running the river, just as they had always done, charging such freight rates as they pleased or were permitted to charge by the railway commission of the state. It was the merest pretense of a contract, and it is patent that the only motive influencing to its execution was a makeshift compliance with one of the conditions of the tax grant made to the railroad by the people of Red River parish, and this with the sole view of claiming that the tax had been earned. This steamboat contract gave the people of the parish absolutely nothing new,—nothing they did not have and enjoy before it was entered into. It cannot for a moment be supposed that the tax payers of the parish, when they stipulated that the railway company should run towboats, with barges, as low down the river as Lake End, and the police jury, on their behalf, in all its proceedings emphasized the conditions of the grant, and even caused them to be referred to and voted on the ballots themselves, ever contemplated that such an agreement as above depicted with the Red River Line would be tendered as a substantial compliance. By the term "towboats or steam tugs, with convenient barges," was meant, not towboats or steam tugs as used in the deep water of maritime ports, but such boats as could navigate the Red river along the front of that parish practically at all seasons, towing barges, when necessary, in low water, to lighten the draught. We have already construed the requirement to mean that these boats were to run up and down the river front of the parish, making frequent connection with the railroad at the points where the road came out to the river. Now, the evidence shows that it took from ten days to two weeks, and sometimes three or four weeks, when the water was very low, for the Scovell to make her trips from New Orleans to Shreveport and return. So that, in point of fact, she passed along the front of Red River parish going up not oftener than once in two weeks, and going down the same. That this was altogether an insufficient compliance with the contract made with the people of the parish is self-evident. It was the reverse of frequent, easy, and continuous connection with the railroad, and it afforded no competition on the river. We have heretofore stated that the running of the Uni from the upper part of the parish to the mouth of the river was not a compliance. Much more lacking in that respect is this substitute agreement to run the Scovell from Shreveport to New Orleans.

Counsel for defendant company claim that the Scovell was operated in the river about the same as the Uni had been, and that the petition of the plaintiffs concedes the running of the Uni was a substantial compliance with the contract. This

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being so, they contend that plaintiffs cannot now set up the contract with the Scovell, and her operations in the river under the same, as lacking sufficient compliance. We do not view plaintiffs' petition in this light. There is no allusion therein to the running of the boats to the mouth of the river, but merely a statement that on the 23d of November, 1898, the defendant caused the road to be inspected by the police jury and "placed a boat in Red river, as required by said conditions and stipulations in the petition of tax payers." There is nothing here about the operation of the boat,—only a mention of its being placed in the river. Presumably, the boat had not then fairly begun its operations, since it was only that day, November 23, 1898, that the jury accepted the road. Elsewhere in the petition is the allegation that defendant had violated its contract by "failing and refusing for more than a year and a half to operate towboats," etc. While this language implies that at one time, or for a while, to wit, when the Uni was in the river, the railroad company had sufficiently complied with the towboat requirement, it does not follow that, because the tax payers chose to put up for three or four months with the running of the Uni as far down as the mouth of the river, they have no cause of complaint against the running of the Scovell as the railroad boat, when she was owned by a transportation line competing with the railroad, and made fortnightly trips from New Orleans to Shreveport and return. The Uni was owned by the railroad, and was a competitor of the Red River Line boats. Even though she did now and then go to the mouth of the river, her trips along the river front of the parish were far more frequent than those of the Scovell, and the evidence is that while she was running the people on the west bank of the river could and did receive and ship freight and cotton by the railroad through the aid of this boat, but that since she was burned in February, 1899, efforts to connect the railroad with the river have practically been abandoned, and planters on the west bank, who had shipped cotton from their landings by the Uni and the railroad in connection with each other, now have to haul it to Coushatta, or some other point, ferry it over the river, and haul it to the railroad, in order to ship by the latter.

The contention that this tax should not be declared forfeited because the parties cannot be placed in statu quo, because no restitutio in integrum can be made, is without weight. We know of no case wherein this argument has been adopted by any court, where a subscription was based upon conditions. If the argument were sound, it would be idle and useless to ever attach any condition to a subscription other than that the road should be constructed. Where a railway is constructed, it cannot well be torn up in order to restore the situation as it was before the tax was voted or the road constructed. The tax payers have received nothing that they can return. They did not become owners of the road by voting

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the tax. They therefore have no road to return to the company. The roadbed and its material, workmanship, and equipment belong to the company, and the latter has parted with nothing to be restored. See *Railway Co. v. Thompson*, 24 Kan. 183. If the company expended its money in constructing the road, they own it, and thus have the equivalent for the money invested.

We hold plaintiffs have made out a case for the forfeiture of the tax for the period covered by their suit,—say the year 1900. The year 1901 is drawing to a close, and the tax for that year is now due; but we are not apprised that the same conditions existed in 1901, warranting the forfeiture of the tax for that year, as did in the preceding year. If they did, the tax is equally forfeited for that year, and will be equally forfeited for each year of failure of compliance on part of defendant company with its contract with the taxpayers of Red River parish as herein interpreted. But we can in this suit deal only with the tax for the period of one year,—1900. From and inclusive of that year the tax has yet eight years to run. Non constat that the defendant may not comply with its contract obligation for the remaining years of the tax term. If it should, and earn the tax, it must be paid. If it should not, the tax is not earned, and should not be paid. We reserve to all parties all rights in the premises.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now adjudged and decreed that the tax voted by the tax payers of the parish of Red River in the year 1897, in aid of the Shreveport & Red River Valley Railway Company, be, and is hereby, declared forfeited, canceled, and annulled in so far as that portion of the said tax due for the year 1900 is concerned, and that defendant pay costs of both courts.

SOUTHERN RY. CO. v. MAYES.

(*Circuit Court of Appeals, Fourth Circuit, February 4, 1902.*)

[113 Fed. Rep. 84.]

Institution of Suit against Foreign Corporation—Admission of Presence within State.

The institution of a suit against a foreign corporation in North Carolina is an admission on plaintiff's part that it is doing business and is to be found within that state at the time.

Same—Personal Injuries—What Law Governs.*

In an action for injuries to the person, brought against a foreign railroad corporation, at plaintiff's election, in North Carolina, where the injury occurred, plaintiff's rights must be determined by the laws of that state.

Same—Limitations—Computation of Period.

Code N. C. § 162, provides that, where a person is out of the state when

*See *Chicago & E. I. R. Co. v. Rouse* (Ill.), 12 Am. & Eng. R. Cas., N. S., 706, and note, 711 et seq.

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an action accrues against him, it may be commenced within the time prescribed after his return, and if after such accrual he departs from and resides out of the state, or remains continuously absent therefrom, for one year, the time of his absence shall not be computed: *held*, that where a foreign railroad corporation was operating its road and doing business in North Carolina at the time of plaintiff's injury, and continued to do so during the entire period limited for commencing suit therefor, an action commenced thereafter was barred; the statute recited not being applicable to such case.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

Charles Price, for plaintiff in error.

Charles W. Tillett (of Jones & Tillett), for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. This is an action brought by the defendant in error against the plaintiff in error to recover damages growing out of a collision which occurred on the 11th day of April, 1897, between the trains of the defendant company, near Harrisburg, N. C., whereby it is claimed that the plaintiff, who was a passenger on one of the trains, was greatly injured and damaged. It is not denied that the collision took place at the time and place alleged in the plaintiff's complaint, in the state of North Carolina; that the plaintiff in the action was greatly injured thereby; and that by reason of that fact he instituted his suit in the state of North Carolina to recover damages because of the alleged injuries.

The bringing of the suit by the plaintiff in the state of North Carolina is an admission upon the part of the plaintiff that the defendant corporation was doing business in, and was to be found in, that state; otherwise there would be no jurisdiction over the defendant corporation, either in the federal or state courts. In this action it is to be noticed that upon the trial of this case the court below took judicial notice of the fact that the defendant corporation, as such, was a citizen of the state of North Carolina, and was operating within the boundaries of that state about 1,200 miles of railroad.

This action was brought on the 18th day of September, 1900, as appears from the date of the summons, which, by the provisions of section 161 of the Code of North Carolina, is the date when an action is commenced. To this action the defendant railroad company interposed a plea of the statute of limitations, which is the only question presented in the record of this case for the consideration of the court; and the assignment of error is that the court below erred in holding that the cause of action of the defendant in error was not barred by the statute of limitations of the state of North Carolina, to which ruling of the court below the plaintiff in error filed an exception.

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The Southern Railway Company, though a foreign corporation, was nevertheless a citizen of the state of North Carolina at the time of the collision,—at least, so far as the rights of any citizen interested in a claim or demand against it. It was a legal entity, and as such represented the rights of the corporators, and had the same legal power as a natural person either to assert or defend its rights. This principle of law is so well established at this date that we deem it unnecessary to cite authorities to support it.

The claim of the plaintiff below is that the defendant corporation was not to be found in the state of North Carolina, so that process could be served upon it, and, under section 162 of the Code of North Carolina, the statute of limitations does not bar a recovery on this action. The facts in this case show that the defendant company was at the time of the accident doing business in the state of North Carolina, and that it has so continued to do up to the date of the said summons, and in fact ever since, and up to the trial of the case. The plaintiff concedes by his action that the defendant company was at the time of the institution of this suit doing business in the state of North Carolina, otherwise he could not have maintained his action in this form. It clearly appears that the status of the defendant company in the state of North Carolina at the time of the accident was the same as at the commencement of the action. If this is true, then the defendant company, although a foreign corporation, was engaged in running its trains over its railroad, and was to be found within the limits of the state, for more than three years after the collision, and prior to the institution of this action. This is an action for damages to the person of the plaintiff, and it is well settled that an action of this character can be maintained wherever the wrongdoer is found. In this case the wrongdoer, as it is claimed by the plaintiff, is the defendant company, which was operating a railroad in the state of North Carolina; and the accident by which the plaintiff was damaged occurring in that state, and he having elected to bring his action in North Carolina, his rights must be determined by the laws of that state.

It is claimed by the plaintiff that, by section 162 of the Code of North Carolina, the defendant company cannot rely upon the plea of the statute of limitations (which is three years) to defeat the action, for the reason that the limitation had not begun to run before the commencement of the action. Section 162 of the Code of North Carolina provides that:

“If when the cause of action accrue, or judgment be rendered, or docketed against any person, he shall be out of the state, such action may be commenced, or judgment enforced, within the time, herein respectively limited, after the return of such person, into this state, and if, after such cause of action shall have accrued, or judgment rendered or docketed, such person shall depart from, and reside out of

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the state, or remain continuously absent therefrom, for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment."

It will be observed that the statute relied upon has no application to the facts in this case. In the first place, the defendant below was not at any time within the three years after the accident and before the commencement of this suit out of the state; and, in the second place, it did not depart or reside out of the state, or remain continuously absent, for the space of one year or more. Neither provision of the statute has any application to the facts of this case; for said facts show conclusively that the defendant corporation ever since it commenced doing business in the state of North Carolina has had a local abode and habitation in that state, for more than three years prior to the institution of this action. The defendant company is, within the provisions of the fourteenth amendment of the constitution of the United States, a person, having all the rights that a natural person may have in actions for or against it. Assuming this position to be true, we reach the conclusion that the defendant corporation is entitled to rely upon the statute as a defense to this action, and that more than three years had elapsed before the suit was commenced.

For the reasons assigned, we are of the opinion that the court below erred in overruling the plea of the statute of limitations, and that the case should be reversed. Reversed.

HOUSTON, B. & N. RY. CO. v. POLLARD.

(*Court of Civil Appeals of Texas, Feb. 20, 1902.*)

[66 S. W. Rep. 851.]

Railroads—Obstruction of Street—Negligence.*

Where a railroad company tore up the pavement at a point where its road intersected a street, and left stones lying at the place without any signal light to show their presence, as required by an ordinance, violation of the ordinance constituted negligence, rendering the company liable to a cyclist injured by colliding with the stones.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Hal G. Pollard against the Houston, Brazos & Northern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. H. Davenport, for appellant.

S. B. Ehrenswerth and J. V. Meek, for appellee.

GARRETT, C. J. On March 8, 1900, at night, while

*See generally, 7 Rap. & Mack's Dig. 709 et seq.

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traveling down Congress street, in the city of Houston, on a bicycle, the appellee ran into some stones at the intersection of Congress and Emanuel streets, and fell, and was hurt. He sustained damages from the injuries received to the amount of the verdict and judgment. It is contended on appeal that there was no evidence to show that the appellant was in any way connected with the presence of the stones in the street. Without setting out the evidence, we think it sufficiently appears therefrom that the appellant was at work on its line of railway at the intersection of the streets mentioned, and had torn up the pavement, and left the stones lying at the place, and that they were dangerous to persons passing along the street. There was no signal light to show the presence of the stones, as was required by an ordinance of the city, and the appellant was negligent in failing to have out the required signal of danger. The judgment will be affirmed.

Affirmed.

BALTIMORE & O. R. Co. *et al.* v. FREEMAN.

(*Circuit Court of Appeals, Sixth Circuit, December 3, 1901.*)

[112 Fed. Rep. 237.]

Receivers—Jurisdiction in Action against—Necessity of Service of Summons.

An order made in a railroad foreclosure suit by a federal court which appointed receivers, intended to reserve to that court jurisdiction to determine all claims and demands against such receivers, does not authorize the maintenance in that court of an independent action at law against the receivers without the statutory service of a summons on the defendants, but at most only permits the presenting of claims by intervening petition in the receivership suit.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

J. H. Collins, for plaintiffs in error.

James & Beverstock, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case presents the single question as to whether jurisdiction was properly obtained in the circuit court of the receivers of the Baltimore & Ohio Railroad Company, the only defendants to the record against whom judgment was rendered in the action. An attempt was made in the first instance to obtain service on the ticket agent, as required by Ohio Rev. St. § 4988. Upon motion to quash this service, testimony was submitted showing that the person upon whom service had been made was not the agent of the receivers at the time of the service, and the court very properly reached the conclusion that such attempted service was nugatory. The court was of the opinion, however, that an order made in the receivership case, wherein the attempt

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was made to permit, if not to require, all litigation against the receivers to be conducted in the court of the appointment, gave to the court jurisdiction of the case, notwithstanding the want of service of summons in the manner pointed out in the statute. This order was made in the foreclosure suit, and is as follows:

“In this cause, the decree entered on the second day of March, 1896, confirming and ratifying the appointment of the receivers, John K. Cowen and Oscar G. Murray, is now enlarged and modified as follows: That the authority and jurisdiction of the circuit court of the United States for the district of Maryland, as the court of primary jurisdiction, be and the same is hereby recognized and confirmed, and said court shall exercise jurisdiction in all matters and proceedings, and make all orders, relating to or affecting the general administration of said trust; that this court retains, and will exercise, jurisdiction in matters of a local nature, and which affect only persons and property in this district, and jurisdiction to settle and determine the claims and demands of the citizens of this district against the receivers, and retains jurisdiction to direct the payment out of the trust fund of the debts and liabilities of the defendant company payable in this district or due to citizens of this district hereinafter enumerated, as may be hereinafter ordered and declared to be preferential, and may also determine, by general or special order, what other debts and demands shall be made preferential; and the orders of this court, in respect to said claims and demands, shall be effectual and bind the property of the defendants' company in this district, and shall be observed and obeyed by said receivers. The court hereby further expressly reserves the right at any time, upon the application of any person interested, or upon its own motion, to make such order and further orders to secure compliance with the terms of this order, and the payment of all claims and demands hereinbefore declared to be preferential, as to the court shall seem meet and proper.”

This order was in conformity to the then prevailing practice in the Northern district of Ohio, undertaking to acquire jurisdiction in the United States court appointing the receiver, of claims and demands against him. Under this order an intervening petition might have been filed, setting up a claim in the case against the receivers, upon which no service of summons would be required. The present action is an independent action at law for the alleged negligence of the receivers. There is nothing in the terms of the order referred to undertaking to dispense with the service of the summons in such independent actions as might be prosecuted against the receivers. The most that can be said of it is that it gives to the citizens of the district the opportunity to present their claims in the receivership action. The prosecution of independent suits was not undertaken to be authorized without

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the statutory service of a summons. When it appeared to the court that the attempted service upon the ticket agent had failed, the motion to quash should have been sustained. After the overruling of the motion the receivers renewed the defense of want of jurisdiction, by answer, and at the trial offered to show the lack of service upon an agent as required by the statute. The trial judge, being of opinion that the ruling upon the motion had foreclosed the question, excluded the testimony.

Under the Ohio practice objection to the jurisdiction for want of proper service may be taken by motion, the appearance being for that purpose only. *Greene v. Railroad Co.*, 62 Ohio St. 67, 56 N. E. 642. After the party has done all within his power to do, by way of seasonable objection to the jurisdiction over his person, subsequent pleading to the merits does not cure an erroneous ruling as to the jurisdiction, nor operate as a waiver of the defendant's right to object thereto. *Dunn v. Hazlett*, 4 Ohio St. 435; *Allen v. Miller*, 11 Ohio St. 374; *Drea v. Carrington*, 32 Ohio St. 595. Filing a petition in error to reverse such erroneous judgment does not effect an appearance. *Foster v. Borne*, 63 Ohio St. 169, 58 N. E. 66.

As there was no proper service upon the receivers the motion to quash should have been sustained, and there was error in failing so to do. The judgment will be reversed and the case remanded to the circuit court, with instructions to sustain the motion to quash the service upon the receivers.

BUCKWALTER v. ATCHISON, T. & S. F. RY. CO.

(*Supreme Court of Kansas, Division No. 2, Feb. 8, 1902.*)

[67 Pac. Rep. 831.]

Railroad Right of Way—Ejectment—Rights of Landowners.*

Where a landowner has stood by and permitted a railroad company possessing the right of eminent domain to build and put in operation a line of road across his land, and thereby creates large interests useful to the company and the public, without first having obtained the authority so to do by the exercise of the right of eminent domain or otherwise, he cannot maintain an action of ejectment against such company to recover the right of way occupied by it and necessary for the operation of such road.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by Laura Buckwalter against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before CUNNINGHAM, ELLIS, and POLLOCK, JJ.

H. P. Farrelly, for plaintiff in error.

A. A. Hurd and O. J. Wood, for defendant in error.

*4 Rap. & Mack's Dig. 244 et seq. ; 19 Am. & Eng. Enc. Law 860.

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CUNNINGHAM, J. This was an action in ejectment, brought by the plaintiff in error, as plaintiff below, against the defendant in error, as defendant below, to recover a strip of land 200 feet wide across 120 acres owned by her in Neosho county; this strip of 200 feet in width being a portion of the right of way of a long and important railroad within and without this state, passing through many of the counties of this state, and connecting its villages and cities. Her petition was filed September 19, 1899. This land was originally a part of what is known as "Osage Ceded Lands," which, previous to December 28, 1886,—that being the date of plaintiff's patent,—belonged to the government of the United States. In the latter part of 1883 the railroad company, from which the defendant derived its title, entered upon this land, and constructed its line of road across the same. The road was fully completed and this right of way occupied on January 1, 1884, and has been continuously so occupied ever since. The plaintiff had, about July 1, 1880, settled thereon, and made valuable and lasting improvements. Title to the land, however, could only be procured by actual purchase, and not by pre-emption or homestead entry. Before the railroad company commenced the building of its line of road, it instituted proceedings for the purpose of condemning a right of way through this and other lands in this country. The plaintiff claims that these proceedings were so irregular as to be absolutely void, and that the railroad company took no rights thereunder; one of the infirmities being that, as she was an actual occupant of the land at the time of these proceedings and claimed an interest therein, she was entitled to a written notice, which was not given. As to whether these proceedings were void we do not determine, as we find ourselves compelled to affirm the judgment of the court below regardless of their sufficiency. This action is one, in short, to put a railroad company out of the possession and deprive it of the use of a portion of its right of way, thus more effectually stopping the running of its trains and the carrying of passengers and freight over its line than would the destruction of bridges or the tearing up of its track, for such damages could be quickly repaired; but to enable the company to resume the use of this right of way, being once legally ejected therefrom, would require the somewhat tedious operation of the process of condemnation under its right of eminent domain. In the meantime not only would the vast financial interests of the company itself be involved, and great money loss result to it, but, much more than this, great public inconvenience and loss would result. How great both might be we have only to think what general consternation would come to many parts of the state and large numbers of people were it announced that a section of a half mile in length in any of our leading railways had suddenly sunk into an abyss, and thereby all communication over such line interrupted for a period of 30 or 60 days.

Such interruption and such private loss find no adequate return to the landowner in a case where a like result would be brought about by the decree of a court in an action of ejectment, for at the end of the time required under the law to accomplish it by a proceeding in condemnation the railway resumes the use of its road, and the landowner must accept the price of his damages. So that, should the court permit plaintiffs to recover in such cases, no benefit could come to them, while incalculable harm, inconvenience, and loss would come to the railway company and general public. Public policy stays the hand of the courts under such circumstances. Again, we think that the equitable doctrine of estoppel prevents the plaintiff's recovery in this case. She obtained her patent to the land from the government in December, 1886. She lived on the land when the road was built across it. She has known of the operation and existence of the road ever since. She has, of necessity, known of the expenditure of vast sums of money in the building, equipment, and extension of the road, and in this case has undoubtedly known of the fact that the road has passed from the hands of the original owners to those of the present proprietors; and yet there is no evidence in the record that she has ever in any way manifested her dissent or objection. This being so, she ought not now to be permitted to stop all traffic over and use of this line of road that she has stood by and without objection permitted to be constructed. These views are abundantly sustained by the authorities. In *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. 446, at pages 583, 584, 113 Ind., pages 447, 448, 15 N. E., this doctrine is announced in the following language: "What we affirm is that acquiescence after public rights have intervened will prevent a landowner from destroying the line of road by wresting possession of a part of it from the company. This principle does not rest upon the right of the railroad corporation so much as upon considerations of public policy. The rights of citizens are often abridged in order that the public welfare may be promoted. Chief among the fundamental maxims of jurisprudence is that which declares 'that regard be had to the public welfare as the highest law,' and this maxim underlies the rule we have under discussion. Under our American constitutions the maxim is not pushed so far as in England. But it goes far enough with us to supply ample ground for denying one who has slept upon his rights a right to dispossess a railroad company charged with a service public in its nature, and important to the social and commercial interests of the country. Compensation he may recover; possession he cannot. To the recovery of just compensation his rights are confined. Our conclusion rests on principle, and is fortified by authority. *Railroad Co. v. Johnston*, 59 Pa. 290; *Smart v. Railroad Co.*, 20 N. H. 233; *Harrington v. Railroad Co.*, 17 Minn. 215 (Gil. 188); *Harlow v. Railroad Co.*, 41 Mich.

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336, 2 N. W. 48; Maxwell v. Bridge Co., 41 Mich. 453, 2 N. W. 639; Railway Co. v. Smith, 113 Ind. 233, 15 N. E. 256; Railroad Co. v. Nye, 113 Ind. 223, 15 N. E. 261. Vast interests are often involved in the maintenance of railroads. They are charged with a public service, and a public character is so strongly impressed upon them that courts exercise a control over them beyond that assumed over individual citizens. They are recognized as instruments of interstate commerce, and as such are within the control of the Federal congress. Robbins v. Taxing Dist., 120 U. S. 494, 7 Sup. Ct. 592, 30 L. Ed. 694; State Freight Tax Case, 15 Wall. 232, 21 L. Ed. 146; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. Ed. 678. They may exercise rights under the power of eminent domain because of their public character. Towns spring into existence along their lines. Factories, elevators, and warehouses are built upon them. The mails of the nation are carried by them. They are common carriers of freight and passengers. All these interests, and more, combine in demanding that a citizen, who has stood by until after the completion of a line of road has involved public interests, shall not be allowed to sever the line and destroy its efficiency by wresting possession of part of it from the company. The case does not stand upon the ordinary doctrine of estoppel. The great principle of public policy enters as an important factor, and controls the judgment of the court. Nor is there any great hardship upon the landowner in yielding to its dominion. Ample remedies are open to him. He may demand and secure full compensation. He may do more, for he may invoke the aid of the strong arm of the courts; but, to do this with success, he must move before public interests are involved. If he remains inactive, better that he suffer, if some one must suffer, than the community. But he need not suffer, for compensation, if seasonably asked, will always be awarded him, although possession will be denied." In Saunders v. Railroad Co., 101 Tenn. 206, 47 S. W. 155, the court uses this language: "By its charter the defendant was authorized to acquire a right of way by condemnation, gift, or purchase, and to construct and operate a railroad thereon. It purchased the right of way here in question, with the rest of the road, from one claiming to have acquired title through another regularly chartered railroad company, which had taken this particular right of way and others in the line and constructed a road upon them. In this manner the defendant has come into the possession of the right of way through the land of the plaintiffs in good faith, and is occupying and using it for the purposes contemplated by its charter. Such being true, that possession cannot be disturbed by an action of ejectment, though the defendant's title be bad on account of the fact that the former company failed to acquire title to this right of way by condemnation or otherwise. At the most the plaintiffs are entitled to compensation and damages only,

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and not to a recovery of the land. Conceding that what previously transpired was ineffectual to divest the plaintiffs of their titles to this strip of ground, and, consequently, that the defendant acquired no title thereto by its purchase, the result of this litigation must be the same, for in that event the defendant, under its charter and the general law, undoubtedly had plenary power to condemn the right of way for railroad purposes, and, being now in possession and actually operating the road, it cannot be ejected, though it has not, in fact, condemned the land and paid for it." In *Roberts v. Railroad Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873, on pages 10, 11, 158 U. S., page 758, 15 Sup. Ct., the court uses this language: "It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purpose, whether with or without the consent of the owners of such lands, a subsequent vendee of the latter takes the land subject to the burden of the railroad; and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession. * * * So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute requiring either payment by agreement or proceedings to condemn, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. *Railroad Co. v. Ormsby*, 7 Dana, 276; *Harlow v. Railroad Co.*, 41 Mich. 336, 2 N. W. 48; *Railroad Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Pettibone v. Railroad Co.*, 14 Wis. 443; *Railroad Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622." In addition to cases cited in opinions above, see *Railroad Co. v. Hetfield*, 29 N. J. Law, 206; *Taylor v. Railway Co.*, 63 Wis. 327, 24 N. W. 84; *South & North Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236, 14 South. 747; *Provolt v. Railroad Co.*, 57 Mo. 256; *Baker v. Same*, Id. 265; *Morgan v. Railway Co.*, 130 Ind. 101, 28 N. E. 548; *Railroad Co. v. Englehart*, 57 Neb. 444, 77 N. W. 1092. While the exact point has never before been passed upon by this court, we find that the logic of the cases heretofore decided compels to this conclusion. *State v. Dodge City M. & T. Ry. Co.*, 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295; *Railroad Co. v. Nyce*, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241. We are, however, but putting ourselves in line with the authorities and with sound reason and public policy in holding that, where a landowner has stood by and permitted a railroad company possessing the right of eminent domain to build and put in operation a line of road across his land, and thereby

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create large interests useful to the company and the public, he cannot maintain ejectment against such company; at least so far as its right of way necessary to the efficient discharge of its duty as a public carrier is concerned. No good will come to the landowner by his success in such action, for as soon as can be done under the law his land is taken, and he receives full compensation therefor. Why should he not be compensated at once, and the vast damage to the public caused by the interruption of traffic be averted? Of course, we do not wish to be understood as holding that a landowner may not successfully maintain an action for his damages sustained at any time within the statute of limitations, or that he may not even maintain his action in ejectment at any time where these public interests had not intervened. It may be that in this case the plaintiff never had any right of action, as she took the title to the land long after the road was built across it, and, so far as we know, with the knowledge and consent of the United States government; but we have viewed it as though she were the owner of the land at the time the road was built, and therefore possessed whatever rights any owner would have.

The judgment of the trial court will be affirmed. All the justices concurring.

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(*Supreme Court of Alabama, Feb. 13, 1902.*)

[31 So. Rep. 590.]

Duty to Look Out for Stock on Track.*

The fact that defendant's railroad was straight for two miles in either direction from where an animal was struck by a train, while it was light, is evidence of negligence; it being the duty of persons in charge of a train to keep a lookout for animals on or near the track.

Killing Stock near Crossing—Negligence—Burden of Proof.

In case of a cow killed on a railroad, not near a public road crossing, the crossing of two railroads, a regular station, or a village, defendant is entitled to instruction that the burden of proof was on plaintiff to show the killing was caused by defendant's negligence.

Appeal from circuit court, Lamar county; S. H. Sprott, Judge.

Action by S. K. Henson against the Kansas City, Memphis & Birmingham Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

This action was brought by the appellee, S. K. Henson, against the appellant, to recover damages for the alleged negligence of the defendant in killing the plaintiff's cow, the value of said cow being fixed at \$75. The defendant pleaded the general issue, and the following additional pleas: "(2) Defendant for further answer says it is not guilty of the matter and

*See *Central of Ga. Ry. Co. v. Dumas* (Ala.), 23 Am. & Eng. R. Cas., N. S., 956, and foot-note.

wrong alleged therein, and denies each and every allegation contained in said complaint." "(3) Defendant, for further answer, says that the plaintiff was not the owner of cow which is the foundation of this suit, and for the injury of which plaintiff sues for damage." The plaintiff demurred to plea No. 2 upon the ground that it should have been sworn to, as it sets up matters that can only be raised by a sworn plea. To plea No. 3 the plaintiff demurred upon the ground that said plea was a denial of the ownership of the property alleged to be injured, which can only be set up as a defense by a sworn plea. These demurrers were sustained. On the trial of the cause the plaintiff proved that he was the owner of the cow alleged to have been killed by reason of being struck by an engine on the defendant's road. The evidence for the plaintiff further tended to show that the place at which the cow was struck was within the corporate limits of the town of Sulligent, and that at the place of the accident the track of the defendant was straight for nearly two miles. John Gunn, a witness for the plaintiff, testified that he saw the cow when she was struck by the defendant's engine, and that the accident occurred between 7 and 8 o'clock at night on January 25th, before the institution of the suit; that it was a moonlight night, and, although it was somewhat cloudy, he recognized that the cow was the one owned by the plaintiff; that he was standing 100 yards from where the accident occurred. During the examination of the plaintiff he testified that he did not see the accident, but that when his cow came home the evening of the accident he discovered that she was injured, and that she died the next day. During the examination of the plaintiff as a witness, he was asked the following questions, to each of which questions the defendant separately objected, and reserved a separate exception to the court's overruling each of such objections: "Did you see a place where there were indications that a cow had been knocked off near the hull house on defendant's railroad?" "Was she ever valuable as a milch cow?" "Was your cow ever at the house of W. W. Stone?" "How long had your cow been at Sulligent?" "Do you know whether W. W. Stone is an employee of the defendant?" During the cross-examination of a witness for the defendant the plaintiff asked him the following question: "Is not a milch cow worth more in the market than a beef cow?" The defendant objected to this question on the ground that it called for immaterial and irrelevant evidence. The court overruled the objection, and the defendant duly excepted. It was shown by the evidence for the plaintiff that the cow alleged to have been killed was a milch cow, and was valued at \$75.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence in this case, they must find for the defendant." (2) "I charge you, gentlemen of the jury, in

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this case, if you believe the evidence, there is no negligence shown against the defendant which would authorize the jury to render a verdict for the plaintiff." (3) "I charge you, gentlemen of the jury, in this case, when the case was called for trial the defendant announced that it was not ready on account of the absence of the witness W. W. Stone, who was sick, and the court being of the opinion that the defendant was entitled to a continuance unless the plaintiff would admit what said Stone would swear, which the plaintiff agreed to do, then I charge, gentlemen of the jury, that it will be manifestly unfair to the defendant for you not to give the evidence of W. W. Stone the same weight as if he had been present to testify to the said state of facts contained in said statement." (5) "I charge you, gentlemen of the jury, that the burden of proof is on the plaintiff in this case to show the killing, and also to show defendant's servants or employees inflicted the injury by carelessness on their part, and that plaintiff must reasonably satisfy you by preponderance of evidence in these two points, and if the plaintiff has failed to do this you will find a verdict for the defendant." (6) "The question for the jury to decide in this case is not alone whether or not the plaintiff's cow was killed by the defendant's company, but before you can find for the plaintiff you must be reasonably satisfied from the evidence that the killing was caused by the negligence of the defendant or its employees, and the burden of proving such negligence rests in this case upon the plaintiff, and the negligence is not presumed against the defendant from the mere proof of striking the cow." (8) "If the jury believe from all the evidence that John Gunn could not identify the cow when he said he saw the train strike the cow, then the plaintiff has not made out his case by a reasonable preponderance of the evidence, which authorizes the plaintiff to recover, and your verdict must be for the defendant." There were verdict and judgment for the plaintiff, assessing his damages at \$52.50. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter and Nesmith & Nesmith, for appellant.

TYSON, J. The second and third pleas of defendant were not required to be verified. There was error, therefore, in sustaining the demurrer to them for want of a verification. *Mayor, etc., v. White*, 109 Ala. 389, 19 South. 428; *Railroad Co. v. Trammell*, 93 Ala. 350, 9 South. 870. It appears affirmatively from the record, however, that defendant had the full benefit of them upon the trial under its first plea. The error was harmless.

There is no merit in any of the exceptions reserved to the rulings of the court upon the admission of testimony.

There was testimony tending to show plaintiff's ownership

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of the cow, and the injury to it by one of defendant's locomotive engines. While it was not shown that the injury was inflicted at or near a public road crossing, the crossing of two railroads, a regular station or stopping place, or in a village, town, or city, it was made to appear that the track of defendant's road at the place at which the alleged injury was committed was straight for about two miles each way. In view of this evidence and the general duty imposed upon persons in charge of a train to keep a lookout for animals on or near the track, it cannot be affirmed that there was no evidence tending to show negligence on the part of those operating the train. *Railroad Co. v. Boyd*, 124 Ala. 525, 27 South. 408.

Charges 1 and 2, each being the general affirmative charge, were properly refused. Charge 3 was argumentative. Charge 5, by the use of the words "preponderance of," was misleading, and properly refused. Charge 6 should have been given. The latter is an exact copy of the one in *Railroad Co. v. Boyd*, which this court said should have been given. Charge 8 was properly refused for the reason, if for no other, that there was evidence, other than that of John Gunn, from which the jury was authorized to infer the identity of the injured cow.

Reversed and remanded.

ILLINOIS CENT. R. CO. v. GHOLSON *et al.*

(*Court of Appeals of Kentucky, March 4, 1902.*)

[66 S. W. Rep. 1018.]

Railroads—Negligent Killing of Stock—Presumption of Negligence—Rebuttal—Peremptory Instruction.*

Where the uncontradicted and unimpeached testimony of the servants in charge of a train by which mules were struck and killed showed that the mules could not have been seen in time to prevent the injury, the presumption of negligence on the part of the railroad company was overcome; and the fact that two or three days after the accident tracks of mules were seen, which, if they were the tracks of the mules killed, and made just before the killing, tended to show that the mules could have been seen in time to prevent the injury, did not tend to prove negligence, as horses and mules were permitted to run at large in great numbers in that section, and the jury would not have been authorized to infer that the tracks in question were made by the mules killed, or just before they were killed; and therefore a peremptory instruction to find for defendant railroad company should have been given.

Appeal from circuit court, Ballard county.

"Not to be officially reported."

Action by R. I. Gholson and Lloyd Gholson against the Illinois Central Railroad Company to recover damages for the negligent killing of live stock. Judgment for plaintiffs, and defendant appeals. Reversed.

*As to how the presumption of negligence from injury to stock by a train may be rebutted, see *Western & A. R. Co. v. Robinson* (Ga.), 23 Am. & Eng. R. Cas., N. S., 508, and foot-note.

Corbett & White and Pirtle & Trabue, for appellant.
Shelbourne & Kane, for appellees.

O'REAR, J. Appellees brought this suit against appellant railroad company to recover for the negligent killing of a number of mules by its railroad train on the 17th day of June, 1900. There were but three eyewitnesses to the act, so far as the record shows. The mules were struck at a point on the railroad track between Filmore yards and Minor Slough trestle. Between Filmore and the trestle was a curve, and it was directly after coming off this curve that the stock was hit by the locomotive. The accident occurred about 2 o'clock in the afternoon. The engineer testified that he was on the lookout, and as they came off the curve onto the straight track he for the first time saw the mules, which were feeding beside the track. They ran onto the track, and about 25 yards ahead of the locomotive. He immediately sounded the whistle when he discovered them starting towards the track, and applied the emergency brakes, stopping his train in the shortest possible distance,—within less than 200 yards,—but not until the mules had been run into. The train was a fast passenger train, running from New Orleans to Chicago, not stopping at way stations. It consisted of about six coaches and the locomotive. The fireman's testimony was that, before entering upon the curve, the train crossed a public crossing, at which he rang the bell until the crossing was passed; that he noticed up the track, and saw no obstructions, nor did he see any live stock. He then turned to put in coal, and was so engaged when he heard the engineer's whistle of alarm, and felt the shock of the sudden application of the emergency air brakes. Looking up, he saw the stock as it was struck, and felt the shock of the striking. A short distance beyond, and in plain view of the point where the stock was struck, was a pump house. The person in charge of it testified that on this occasion he was standing on the platform, looking down the railroad track in the direction whence the passenger train was coming; that he saw the mules grazing between the two tracks,—that is, the track of appellant railroad and that of the Mobile & Ohio Railroad, which was probably some 50 yards distant; that when the locomotive came into view around the curve the mules ran onto the track, evidently attempting to cross over; that they were but a few yards ahead of the locomotive when they reached the track, and that the engineer was whistling with the alarm signal, and did stop the train within 200 yards of the point when he first could have seen the stock, but not until after the mules had been struck. The country was unfenced for many miles. Stock was turned loose in great numbers, the neighborhood affording good grazing. Horses and mules were frequently seen on the track at and near the point where these mules were killed. Two days after the killing of the stock, appellee and another person found them, though some of them had been buried. They went

down the track some several hundred yards to a pond or pool of water, and they discovered, as they testified, tracks of horses and mules coming from the direction of this pool to the points near the trestle where these mules were killed. They further testified that some of these tracks indicated that the mules had been running.

From the fact that live stock is killed by a railroad train, the statute raises a presumption of negligence in the killing. In this case the testimony of the trainmen and all the eyewitnesses clearly refuted this presumption. It then became the duty of appellees to show negligence by direct proof. It should be such as to of itself establish the negligence. It is not sufficient if it merely shows circumstances indicating the possibility of negligence in the case. The fact of finding the stock killed by the railroad train showed that much, at least. The statutory presumption above stated is a rule of necessity. But the ends of justice do not require it to be further extended. We are of opinion that, in view of the evidence that horses and mules were permitted to run at large in great numbers and indiscriminately in this section, that they were frequently seen in this particular neighborhood, the evidence merely of tracks, seen two days after the accident, was not a circumstance sufficient to overcome the positive testimony of appellant's witnesses. In fact, there is no conflict of testimony in this case. Taking all as true that was said by appellees' witnesses, it does not involve the disbelief of any statement made by appellant's witnesses; for it may be admitted as true that there were tracks as deposed to by appellees' witnesses, that these tracks showed for some 200 yards or 300 that the mules had run up the railroad track; yet it is not shown that the tracks mentioned were made by these mules, or that they were made on the occasion of the killing. If there was not the statutory presumption of negligence (and when it has been sufficiently overcome by positive evidence it is the same as if there was no such presumption, for all practical ends), and plaintiff was under the necessity of proving negligence on the part of the railroad company in killing the stock, then the mere presence of tracks, found two days after the accident, and which, as shown by the evidence, may or may not have been made by these mules, or may or may not have been made on this occasion, the plaintiff's case would fail for want of proof. If there was evidence for the plaintiff discrediting or contradicting appellant's witnesses, and which would, therefore, tend to destroy appellant's rebutting testimony, leaving the statutory presumption, the case would have been properly submitted to the jury. But there is none. All of appellees' evidence may be believed without in the slightest discrediting any of the other testimony in the case. We do not have to weigh the credibility of witnesses, nor consider the probability of their tales. Whatever may have been their motive of bias to be gathered from the fact of their

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connection with appellant, or whether it was as great or greater than that of the owner of the stock upon the other side, we are not here concerned with. Nor is it necessary for us to find that men in such employment, whose occupation through many years of trial has been that of handling train loads of people, so many human lives and so much of valuable property committed to their fidelity, to their courage, and to their judgment and skill, would perjure themselves for the inconsiderable interest to them involved in this case. Were the evidence conflicting, the credibility of the witnesses must be passed upon by the jury; but we cannot agree that such a slight circumstance, one so commonplace, and so naturally explained in consonance with the integrity of the testimony of eyewitnesses who are unimpeached as to their character, and whose testimony bears every evidence upon its face of being straightforward and truthful, is sufficient to authorize the submission of the case to the jury. Therefore the peremptory instruction asked for by appellant should have been given at the close of the evidence.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

CITY OF KALAMAZOO v. MICHIGAN TRACTION CO.

(*Supreme Court of Michigan, May 7, 1901.*)

[85 N. W. Rep. 1067.]

Electric Street Railway—Construction of Road—Ordinance.*

Defendant secured an ordinance from the relator authorizing it to construct and operate an electric street railway within its limits. The ordinance provided, "The track * * * may be of the style known as 'T rail,' or 'girder rail,' at the option of the grantee." The city council reserved the right to make such other rules, orders, and requirements as might from time to time be deemed necessary to protect the interests, safety, welfare, and accommodation of the public, not inconsistent with the provisions of the ordinance, and to require the defendant to use such fixtures and appliances upon its said road, plant, and cars as might be deemed necessary to the public safety in the operation of said road. The council subsequently amended the ordinance by requiring the defendant to put down a girder or grooved rail. This was rendered necessary by the fact that the old T rail is unsuitable in streets paved with brick: *held*, that under the terms of the ordinance the city retained the power to require the use of the girder or grooved rail.

Certiorari to circuit court, Kalamazoo county; John W. Adams, Judge.

Application by the city of Kalamazoo for a writ of mandamus against the Michigan Traction Company. From an order granting the writ, defendant brings certiorari. Affirmed.

(Stipulated facts omitted.)

*As to the regulation of street railways by ordinance, see 7 Rap. & Mack's Dig. 437 et seq. ; 23 Am. & Eng. Enc. Law 1003 et seq.

James W. Osborn, for appellant.

L. N. Burke and Dallas Boudeman, for appellee.

GRANT, J. The sole question arises over the requirement to substitute a grooved rail for a T rail. It is contended on behalf of the relator that the grooved rail is essential to the maintenance of a substantial pavement; that the requirement is therefore reasonable, is within the reservation of the ordinance itself, and incident to the powers and duties of the municipality pertaining to its streets. It is contended on behalf of respondent that the substitution of the grooved rail is inconsistent with the original ordinance, and in violation of its contract with the city. It admits the duty to repave whenever the city does, but maintains the right to use its own option, during the life of its franchise, as to the kind of rails to be used. The question is an important one. The stipulated facts are that the old T rail is unsuitable in streets paved with brick. It renders the surface of the street rough and uneven; requires more frequent repair; causes more expense; is unsightly, inconvenient, and dangerous for the passage of vehicles. Under respondent's contention, it could practically prevent any improvement in paving, or the adoption of new and better material, unless it could be used in connection with the T rail, which the respondent had the right to lay when the road was constructed, and which it now claims the right to relay and maintain. It could not even be compelled to substitute the grooved rail for the T rail, even if the city should offer to pay the expense; for it claims that the right to lay the T rail was a part of the contract which cannot be taken away. The amended ordinance does not impair the franchise conferred upon the respondent. The city recognizes respondent's right to the use of the street, to run its cars, and to charge the fares fixed by the ordinance. It only claims that conditions have changed, requiring essential changes in the character and manner of paving, and that the respondent must so construct and equip its road as to meet these changed conditions. In other words, the relator only claims that the respondent must lay new and different rails, at greater cost than that of the old ones. The respondent is deprived of none of its property, unless the increase in cost in consequence of the improvement amounts to such deprivation. It is essential that municipalities retain that control over the public streets and highways which is necessary for the protection and proper use of the public. Courts will jealously guard the right of such control. It must be a very plain provision, indeed, in a contract, which will justify the courts in holding that this power has been conveyed away. Where doubt exists, such contracts will be construed against the surrender of such power. Counsel for respondent cite the following authorities: *People v. Chicago W. D. Ry. Co.*, 118 Ill. 113, 7 N. E. 116; *State v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *City of*

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Binghamton v. Binghamton & P. D. Ry. Co. (Sup.) 16 N. Y. Supp. 225; Brooklyn Heights R. Co. v. City of Brooklyn (City Ct. Brook.) 18 N. Y. Supp. 876; City of Burlington v. Burlington St. Ry. Co., 49 Iowa, 144, 31 Am. Rep. 145; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303, 8 Atl. 123; Northwestern Tel. Exch. Co. v. City of Minneapolis (Minn.) 83 N. W. 527, 4 Mun. Corp. Cas. 360; Williams v. Railway Co., 130 Ind. 71, 29 N. E. 408; Mayor, etc., of Houston v. Houston City St. Ry. Co., 83 Tex. 548, 19 S. W. 127; Easton, S. E. & W. E. Pass. Ry. Co. v. City of Easton, 133 Pa. 505, 19 Atl. 486; City of Waterloo v. Waterloo St. Ry. Co., 71 Iowa, 193, 32 N. W. 329; City of Detroit v. Detroit & H. Plank-Road Co., 43 Mich. 140, 5 N. W. 275. In *People v. Chicago W. D. Ry. Co.* the question was: Can the municipality, under an authority permitting the construction of a street railway, compel the company to extend its tracks into streets where the road must be run at a loss? It was held that no such power was reserved. It is there said: "Doubtless the common council, notwithstanding the grant to the railway company of the right to use the streets, retained full power and authority over the streets to improve them, and use them for all purposes for which they were dedicated to public use. But that reserved power conferred no right on the common council to compel, by ordinance, the construction and operation of a street railway." In *State v. Corrigan Consol. St. Ry. Co.* the charter required the company to keep and maintain the space between its rails in good repair. The council sought to compel the company to put in a new pavement of stone. It was held that the original ordinance gave no such power; that the new ordinance was in violation of the contract; and that, under the pretense of exercising the police power, the duty of paving could not be shifted upon the defendant. In *Brooklyn Heights R. Co. v. City of Brooklyn* the company, by its original charter, was granted authority to locate its car house and turnouts at such points as should be approved by the commissioner. Held, that such assent could not be withdrawn after its acceptance and the construction of the road and buildings. In *City of Burlington v. Burlington St. Ry. Co.* it was held that, where the charter gave the right to maintain a double track, it could not afterwards limit the company to a single track. Such an ordinance was held a violation of the original contract. It was also there attempted to maintain the ordinance as an exercise of the police power. The court declined to pass upon that question, upon the ground that the double tracks were not shown to constitute a nuisance. In *Hudson Tel. Co. v. Jersey City* it was held that the common council could not revoke the designation of streets for the erection of poles and the stretching of wires, after the ordinance had been accepted and the poles erected. In *Northwestern Tel. Exch. Co. v. City of Minneapolis* it was held that the municipality could not arbitrarily order the poles

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and wires removed, and the wires placed underground. The case is a well-considered one, and recognizes the reservation of the authority in the common council to require the removal of the poles, if necessary for the protection of the inhabitants and the proper use of the streets. The opinion states: "To prevent any misunderstanding, we add that the complaint tenders the issue that the city council arbitrarily and without any reasonable necessity enacted the ordinance complained of. The demurrer admits the allegations of the complaint in this respect, and our conclusion is based upon this admission. If, however, the plaintiff in the trial fails to establish such allegation by competent evidence, it must comply with the ordinance, for it is not to be doubted that the city council has the plenary power to extend the subsurface district wherever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot do so arbitrarily in the premises, as alleged in the complaint." In *Williams v. Railway Co.* Mr. Williams was restrained by the court from removing a house along a public street, where it would obstruct the business of the company, and necessitate the cutting of its wires. The moving of a house is not an ordinary use of the street. In discussing the rights of the railway company the court said: "It is undoubtedly true that all such rights are subordinate to the paramount power usually denominated the 'police power,' for that power cannot be annihilated by contract." See, also, *Booth, St. Ry. Law*, §§ 39, 40. In *Easton, S. E. & W. E. Pass. Ry. Co. v. City of Easton* the ordinance was silent as to the style of rail to be used by the company. It originally adopted a flat rail, but concluded afterwards to substitute a T rail, which created no greater obstruction, and did not increase the cost to the city. Held that the use of such rail would not be restrained by the courts. A like state of affairs existed in *City of Waterloo v. Waterloo St. Ry. Co.* The court denied the city an injunction, and said: "The city may require defendant to so exercise the privileges conferred upon it by the grant as that the use of the street for ordinary purposes will not be unreasonably interfered with. It has the power to make all necessary and reasonable regulations as to the manner in which the track shall be constructed, and the condition in which it shall be maintained." In *City of Detroit v. Detroit & H. Plank-Road Co.* the sole question was whether a plank-road company could be deprived of its property and its right to take toll by including one of its toll houses and some of its road within the limits of the municipality. Counsel cite other authorities, but they are all of the same import. The cases cited may be thus classified: (1) Those which absolutely take away some right expressly conferred, and which does not conflict with the rights of the public; (2) those which impose new burdens not contemplated by the ordinances; (3) those which arbitrarily impose conditions without any showing that

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they are necessary for the protection and safety of the public. They do not, in our judgment, control the present case.

It is too late now to question the rule that these corporations may obtain contractual rights in streets and public highways which the municipality cannot repudiate or annul, when such rights are not inconsistent with the ordinary uses of streets and highways. That rule is settled. The authorities do not, however, go so far as to hold that the grant of a right to use a certain kind of rail is irrevocable. On the contrary, the conclusion seems to be that, when the use of another kind of rail becomes necessary for the protection and safety of the public, the right to use the specified article must give way to the necessities and requirements of the public. Such contracts must be liberally construed in favor of the municipalities. Where the ordinance required that a street-railroad company should keep the parts of the streets used by it "in as good repair and condition as the city keeps the balance of its streets, and of even grade with the streets so that carriages and other vehicles can cross with ordinary ease," it was held that when the city repaved its streets it was the duty also of the railway company to repave. *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 611, 10 South. 590, 595. The power reserved by section 23 of the ordinance (see fifth finding of facts) was the power "to make such further rules, etc., as were deemed necessary to protect the interests, safety, welfare, and accommodation of the public," but it expressly prohibited the reduction of the rate of fare, or alteration or repeal of section 1. Section 9 also provides: "The city council may from time to time require the said grantee, its successors and assigns, to use such fixtures and appliances upon its said road, plant, and cars as may be deemed necessary to the public safety in the operation of said road." The learned counsel for respondent concede that under this reservation and the police power the city might require respondent to use a heavier rail than a 40-pound T rail, or, at respondent's option, a girder rail, if necessary to preserve the pavement, and render it reasonably safe for travel. But the stipulated facts show that a brick pavement and the T rail cannot be used together without leaving the surface of the street not only rough, uneven, and inconvenient, but dangerous. If respondent's contention be the law, the singular result would follow that respondent could not, with safety to the public, pave between the tracks with brick, as by the ordinance it is required to do, and that the city could adopt only such pavement as could be used with safety in connection with the T rail. We must give the words "fixtures and appliances," as used in section 9, some force. The right to compel their use is clearly reserved. The term "fixtures" does not refer to movable things; it refers to things that are fixed. Trolley poles, overhead wires, rails, and ties are fixtures. This ordinance, fairly construed, cannot be held to mean that the respondent, in

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the construction of its roadbed in accordance with the provisions of the ordinance, obtained the right, during the existence of its franchise, to maintain its roadbed and rails in the same condition as when laid. The ordinance contemplated improvements which experience might show to be essential, in the growth of the city, for the convenience, welfare, and safety of travelers upon its streets, and the right to compel such improvements was reserved. This court held, in an able opinion by Justice McGarth, that the city of Detroit could compel a street railway to remove all that portion of its railway ties outside of the stringers on which the rails were placed, so that the street might be paved with a concrete foundation. The change involved great expense. The railroad bed had been constructed in accordance with the requirements of the ordinance less than two years before the change was ordered. The reservation in that case was the same as in this. The only essential difference between the two ordinances is that the one in that case did not expressly provide for laying the ties beyond the girder, while the one in this case expressly provides for the kind of rail. But the one in that case did provide that "the rails of said street railway shall be laid on a foundation equal to that of Woodward avenue, or any other first-class railroad." It complied with the ordinance, and laid the track in the manner authorized by the city. The right to extend its tracks beyond the girders was implied. It had been the ordinary way of constructing street railways. The foundation was equal to that of any other first-class railroad. *City of Detroit v. Ft. Wayne & E. Ry. Co.*, 90 Mich. 646, 51 N. W. 688. Would the rule have been different if the ordinance had expressly provided that the ties might extend beyond the girders,—then the customary method of constructing roads? Would the court have said that the pavement could not be laid unless the railroad company would consent to make the change necessary for the pavement? We think not. We think this case is within the principle there established. The common council did not act arbitrarily, but reasonably. Judgment affirmed.

LONG, J., did not sit. The other justices concurred..

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(*Court of Appeals of New York, Feb. 25, 1902.*)

[62 N. E. Rep. 1071.]

Street Railroads—Injury to Person on Track.*

A complaint in an action against a street railroad company alleged that defendant operated its car without a fender, contrary to the city ordinance, which also prohibited the use of any fender until it was approved by the common council. The day after the adoption of the

*As to the regulation of street railways by ordinance, see preceding case and foot-note.

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report approving special fenders, the fenders were ordered, but were not received until after the accident: *held*, that it was error to fail to charge at defendant's request that it was not bound to have the fenders at the time of the accident, and to instruct the jury to determine whether the defendant had used reasonable care to procure fenders after the approval of the common council.

Appeal from supreme court, appellate division, Third department.

Action by Charles N. Platt, administrator of Harry Platt, against the Albany Railway. From a judgment of the appellate division (67 N. Y. Supp. 1144) affirming a judgment for plaintiff, defendant appeals. Reversed.

On the 29th of May, 1897, Harry Platt, a lad between 11 and 12 years of age, was run over and killed by an electric car as he was crossing the tracks of the defendant on Broadway at its intersection with North Lansing street, in the city of Albany. The plaintiff, as administrator of his estate, brought this action to recover damages, upon the ground that the defendant was negligent in many ways, and, among others, in operating the car in question without a fender. The defendant, in its answer, denied negligence on its part, charged that the death of the decedent was caused by his own negligence, and alleged that it used due diligence to equip its cars with fenders as soon as permitted by the common council. The jury found a verdict for the plaintiff, and the judgment entered thereon was affirmed by the appellate division, one of the justices dissenting.

Albert Hessberg and Simon W. Rosendale, for appellant.
S. T. Hull, for respondent.

VANN, J. We think there was a question of fact for the jury as to the negligence of the defendant, independent of the allegation that there was no fender on the car which ran over the decedent. We are also of the opinion that there was evidence which, if believed by the jury, warranted the conclusion that the plaintiff's intestate was free from contributory negligence. We find no reversible error in the record, except the charge of the trial judge, and his refusal to charge as requested, in relation to the omission of the defendant to equip its cars with fenders prior to the accident. It appeared that on the 7th of October, 1895, the common council of the city of Albany required, by an ordinance duly passed, that every car operated by electricity and run upon a track should be provided with a fender; but the same section further commanded that "no railroad operated by electricity shall use any fender or fenders, guard or guards, until the same shall have been approved by the common council, which said approval shall be filed with the clerk of the common council, and the use of such fender or fenders, guard or guards, shall be deemed a compliance with this provision." On the 25th of November, 1896, the defendant presented a communication to the common council stating that, after various tests, it had selected a

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fender manufactured in Providence R. I., as the most suitable to prevent accidents, and asking that body to approve of its use in accordance with the terms of said ordinance, "in order that the company may, without unreasonable delay, equip its cars with such fenders." This communication was referred to the committee on railroads, which made no report upon the subject until the 17th of May, 1897, when it recommended the use of the fender selected by the defendant. The report was adopted at once, but, as it does not appear whether the mayor signed the resolution or not, we cannot tell whether it went into effect on the day of his approval, or not until 10 days after its passage. City Charter (Laws 1883, c. 298, tit. 3, § 9). Upon the day after the adoption of said report by the common council, the defendant ordered the Providence fender; but the first lot was not received until the 16th of June, 1897, and in the meantime the accident in question had happened. Thus it appears that the fenders were ordered by the defendant immediately after the adoption of the resolution which specified the kind that could be used, and even before it is certain that the resolution had gone into effect.

The only allusion to the subject of fenders made by the trial judge in the body of his charge was as follows: "There are other questions, relating to the bells and gong and fender, that I shall not discuss at any length before you, because, with the statement that I have made, they are not of great importance; and I shall not call especial attention to them unless it is desired by the counsel on the part of the plaintiff and defendant, in which case I will answer the questions which they submit to me." At the close of the charge the defendant requested the trial judge to instruct the jury that "the absence of a fender from the car was not per se negligence," and the court so charged. Thereupon the defendant requested the court to further charge that "the defendant was not bound to have a fender on the car at the time of the accident." In response to this request the trial judge said: "This makes it necessary for me to say a little more to the jury." Thereupon he recited the facts already stated in relation to the ordinance governing the use of fenders, the communication of the defendant upon the subject, and the action of the common council thereon. He then continued: "That [referring to the selection of a fender] was not approved by the common council until the 17th day of May, 1897, as this accident occurred on the 29th day of May, 1897; and it appears that on the following morning the railroad company ordered fenders, and that they were not received until the 16th of June following the accident, and were then placed upon the cars. I charge you that the company had a reasonable time to place fenders upon their cars after the approval of the common council, and leave it to you whether they did not use reasonable diligence in providing fenders after the common council had approved the fenders as stated." The defendant ex-

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cepted to the refusal to charge as requested, and to the charge as modified. The jury may have based their finding that the defendant was guilty of negligence upon the fact that there was no fender on the car which ran over the plaintiff's intestate. While other grounds of negligence were alleged, no negligent act was so conclusively proved as to leave no question for the jury. They may have found, as permitted by the charge of the court, that the defendant was guilty of negligence in not using reasonable diligence to provide fenders after the common council had approved the Providence fender. The evidence did not warrant this conclusion, for the defendant acted promptly when it was in a position to act at all. Whatever may be said of its course in making a selection, to question the promptness of its action after its selection was approved would be unreasonable. By command of the ordinance, it could not attach fenders to its cars until the kind selected had been approved by the common council. That approval was not given until the 17th of May, and the next day the fenders were ordered from the manufactory where they were made, in another state. No fender had arrived when the accident happened, and it does not appear that the defendant could have done anything more than it did, after the fender was approved and it was permitted to do anything further in relation to the subject. Whether the resolution of approval took effect 2 days or 12 days before the accident, the defendant did all it could to comply with the direction of the common council. It had a reasonable time, as the court properly charged, to obey the command of the local legislature, and it used that time with diligence. It was under no obligation to order fenders in advance of the approval of the common council, for that might have involved useless expense, as there were several kinds in use. All that was required was prompt action as soon as it knew what fender to order, and prompt action was conclusively proved. As the jury had received no instruction whatever upon the subject, the defendant was entitled to the instruction prayed for. It did not ask to have the question of liability for failing to use fenders wholly withdrawn from the jury, and it was apparently willing that its alleged want of diligence in selecting a fender should be considered by them. Its request simply involved the proposition that it was not bound, as matter of law, to have a fender on its car at the time of the accident; thus impliedly conceding that its diligence or want of diligence in making a selection should be left to the jury, as a question of fact. It was, at the least, entitled to this, and a failure to charge, either literally or in substance, as requested, was reversible error. *Mitchell v. Turner*, 149 N. Y. 39, 43, 43 N. E. 403. The court not only omitted to comply with the request, but went further, and charged that the jury might find whether the defendant had used reasonable diligence in equipping its cars with fenders after the fender selected had been

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approved by the common council, although during the short interval that elapsed between the approval and the accident the railroad company had done everything which, so far as appears, it could have done to procure fenders. This, also, was reversible error, for it cast a burden upon the defendant which the law did not require it to bear. The law required reasonable diligence, but the charge, so far as the evidence permits us to see, required an impossibility.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, and MARTIN, JJ., concur. O'BRIEN, J., not voting.

Judgment reversed, etc.

CITY OF STILLWATER v. ST. PAUL & M. SUBURBAN RY.
Co. *et al.*

(*Supreme Court of Minnesota, May 24, 1901.*)

[86 N. W. Rep. 103.]

Street Railways—Construction.*

Villages of this state having less population than 3,000, incorporated under the provisions of title 3, c. 10, Gen. St. 1894, have no authority to authorize the construction and operation, for a definite term of years, of street railways in the streets of such villages.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; J. F. McGee, Judge.

Action by the city of Stillwater against the St. Paul & Minneapolis Suburban Railway Company and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. C. Nethaway, City Atty., for appellant.

Munn & Thygeson, for respondents.

START, C. J. This is an appeal by the plaintiff from an order sustaining the defendants' demurrer to its complaint. The here material allegations of the complaint are, in effect, these: The council of the city of Stillwater in March, 1899, granted to the defendants a franchise, for the term of 25 years, to build, maintain, and operate an electric street-railway line along and over certain streets of the city, with the right to charge and collect five cents for each passenger carried thereon. It was also provided by the ordinance granting such franchise that the defendants should apply to the proper authorities of the village of South Stillwater for authority to construct and maintain a street railway line from the terminus of their line at the limits of the city to some convenient point

*As to whether a municipality has authority to grant to street railways the right to use streets, see 23 Am. & Eng. Enc. Law 948 et seq.; 7 Rap. & Mack's Dig. 358 et seq.

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within the village; and, further, that within six months after receiving satisfactory authority therefor they should build and complete such line into the village, and thereafter operate it in connection with their line in the city, and carry passengers from the city limits to any point along the line in the village for an additional fare of five cents. The defendants applied for such authority to the council of the village, which passed an ordinance granting it, in terms, and requiring the defendants to accept the provisions of the ordinance within 30 days after its passage. The defendants never accepted the ordinance, and never built the village line, but they built and still operate the city line. This action was brought by the city to compel a performance by the defendants of the contract as to the village line or to cancel the whole contract. It is to be noted that the defendants were obligated to build and operate the village line in connection with their city line, provided they received satisfactory authority from the village so to do. The fair inference, then, is that they were to receive a franchise for the village line for the same term (25 years) as that of their franchise for the city line. The village of South Stillwater was and is a municipality containing less than 3,000 inhabitants, and was incorporated under Gen. St. 1894, c. 10, tit. 3. The only question for our decision on this appeal is whether the village council of the village of South Stillwater had power to grant a street-railway franchise for the term of 25 years or for any definite term. The councils of villages of the class to which the village of South Stillwater belongs are expressly empowered "to lay out, open, change, widen, or extend streets, lanes, alleys sewers, parks, squares, or other public grounds, and to grade, pave, improve, repair, or discontinue the same, or any part thereof; * * * to prevent the incumbering of streets, sidewalks and alleys with carriages, carts, wagons, sleighs, sleds, buggies, railway cars, engines, boxes, lumber; * * * to ordain and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce, * * * as they shall deem expedient;" to make, erect, establish, and control waterworks for the supply of water for public and private use; also to build and control electric light plants for supplying light for public and private use. They are also authorized to govern the streets, highways, and public places of their respective villages. Gen. St. 1894, §§ 1224, 1225, 1250.

The village councils of villages having a population of more than 3,000 are expressly granted the power to provide for and control the erection and operation of electric lights, street railways, telephone exchanges, belt-line or inclined railways, or all railways within the corporate limits of their respective villages. Gen. St. 1894, § 1299, subsec. 47. The power to grant the use of their streets by street railways has been granted in express terms by the legislature to the principal

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cities of the state. It is the contention of the plaintiff that the general provisions we have quoted, giving power to villages having a population of less than 3,000 by their respective councils to control and govern their streets, by necessary implication includes the power to grant a street-railway franchise. There are adjudged cases that hold, in effect, that authority to a municipality to establish and control its streets includes the power to license the use of its streets for street-railway purposes, unless a different legislative intent is apparent. Booth, St. Ry. Law, § 15.

It, however, seems quite clear, from the statutes to which we have referred, that the legislature did not intend to include, in the general grant of the right to supervise and control the streets in villages having a population of less than 3,000, the power to license the use of their streets for railway purposes, and much less the right to grant a street-railway franchise for a definite term. If it was the intention of the legislature to grant so important a power to such villages, it would seem reasonable to believe that it would have done so in express terms, as was the case of villages having a population of over 3,000 and the cities of the state. Again, if such was the intention, why should the legislature grant the power to such villages in express terms to erect and maintain water-works and light plants, and leave the power to grant the use of streets to street railways to be implied from the general authority to establish and control streets? Our conclusion is that the legislature did not intend to and did not give to such villages the power to grant street-railway franchises for a definite term. *People's R. Co. v. Memphis R. Co.*, 10 Wall. 38, 19 L. Ed. 844; *Davis v. Mayor, etc.*, 14 N. Y. 506, 67 Am. Dec. 186, and notes.

It is further claimed by the plaintiff that Gen. St. 1894, § 2642, which declares that it shall be competent for municipalities to agree with a railroad company as to the terms on which it may occupy any street which may be necessary in the location of any part of its railroad, authorizes the grant in question. This provision manifestly refers only to commercial steam railroads. *Funk v. Railway Co.*, 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608. We therefore hold that the village of South Stillwater had no power to grant the franchise in question. Order affirmed.

NAGEL *et al.* v. LINDELL RY. CO. *et al.*

(*Supreme Court of Missouri, Division No. 1, Feb. 19, 1902.*)

[66 S. W. Rep. 1090.]

Construction of Street Railroad—Petition for Injunction—Allegation of Fraud in Passage of Ordinance.*

A petition in a suit against three street railroad companies to enjoin

*As to whether an abutting owner may enjoin a street railway company from using the street, see 23 Am. & Eng. R. Cas., N. S., 958 et seq.; 7 Rap. & Mack's Dig. 419 et seq.

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them from laying their tracks in a street, which alleges that the ordinance authorizing the construction of the road was obtained by fraud of the defendants, their agents, servants, and attorneys, in bribing aldermen, councilmen, and members of the municipal assembly by paying or promising to pay money, stocks, bonds, or privileges to such officers, is uncertain and insufficient in failing to specifically state the acts constituting the fraud.

Same—Same—Conclusions of Fact.

An allegation, in a petition to restrain a street railway company from laying double tracks in a street, that it is a narrow street, and that such tracks will greatly impair its usefulness in not leaving room between the tracks and curb for wagons to pass, is a mere conclusion, and insufficient to show a use of the street which will practically destroy it as a highway, and authorize an injunction to restrain the railroad's construction.

Same—Damages.

Rev. St. 1889, § 1825, requiring street railroad corporations, before taking or damaging any property in the construction of their railroads, to determine and pay the damages caused to the owners of real or personal property, does not give a right to damages not existing before the passage of the act, and a property owner is only entitled to damages which are peculiar to his property, and not common to all abutting owners.

Same—Same—Preparatory Work.

The act of a street railroad company in tearing up the street preparatory to building its road, and piling ties and rails in the street, being a necessary incident to the construction of the road, is not such a damage to an abutting property owner as will authorize an injunction to restrain the construction of the road.

Appeal from St. Louis circuit court; Wm. Zachritz, Judge.

Suit by Frank A. Nagel and others against the Lindell Railway Company and others.

This is a suit in equity, aiming to enjoin the defendants from constructing a street railway in Hamilton avenue in St. Louis. The circuit court sustained a demurrer to the petition, and, the plaintiffs declining to plead further, the court rendered judgment for defendants, from which one of the plaintiffs appeal.

(Statement of facts omitted.)

Sterling P. Bond, for appellant.

Boyle, Priest & Lehmann and Geo. W. Easley for respondents.

VALLIANT, J. (after stating the facts). 1. A mere charge of fraud, without specification of the act or acts which constitute the alleged fraud, amounts to nothing in pleading, and would be stricken out on motion. We have said this so often that it would seem useless to cite authorities to support it. *Bank v. Rohrer*, 138 Mo. 369, 39 S. W. 1047; *Goodson v. Goodson*, 140 Mo. 206, 41 S. W. 737; *Burnham v. Boyd*, 66 S. W. 1088; *Wood v. Carpenter* (not yet officially reported) 66 S. W. 172; 9 Enc. Pl. & Prac. p. 683. The petition charges that the municipal assembly was corrupted by bribery, but it does not state who was the briber, nor who the bribed. There are three corporations involved, two of which, according to the petition, acquired their interests after the franchise

had been granted. Whether it is intended to include them in the charge is not clear. "Their agents, servants, and attorneys" designates a large and unknown class. "The aldermen, councilmen, and members of the municipal assembly" covers a large number of officials in general, but points to no one in particular. Paying or promising to pay "stocks, bonds, privileges, and large sums of money to vote for said pretended franchise and ordinance" is as vague and uncertain as language could make the charge. There is no statement as of a fact which could be traversed; there is no issue tendered. A demurrer admits only facts well pleaded. It does not admit a mere characterization, which is all there is of the charge of fraud in this petition.

2. In *Lockwood v. Railroad Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547, this court decided that the city of St. Louis could not grant to a railroad company a license to so use a street as to practically destroy it as a highway for the general public. Whilst recognizing the authority in the city to permit a railroad company to occupy the streets along with the public, it was decided that such permission could not be given to occupy it to the exclusion of the public; and, the facts in that case showing that the use threatened by the railroad would practically exclude the public from the street, an injunction was granted at the suit of an abutting property owner. The same doctrine was announced in *Schulenberg & Boeckeler Lumber Co. v. St. Louis, K. & N. W. R. Co.*, 129 Mo. 455, 31 S. W. 796, and *Sherlock v. Railway Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551. The plaintiffs seek to bring their case within the law as declared in those cases, but their petition fails to show a similar condition. In the first of those cases it was shown that the street was only 24 feet wide from curb to curb, and in that space, in front of the plaintiff's property, the defendant had laid double tracks for its steam railroad. In the second the street was occupied by four tracks of two steam railroads, and the defendant was about to occupy the sidewalk with other tracks in front of the plaintiff's property. In the third case there was a steam railroad about to be laid along an alley 16 feet wide. In the case at bar we have a street railroad to be laid along the surface, which in itself is not inconsistent with the use of the street at the same time by the general public. The width of Hamilton avenue is not stated in the petition. The statement is, "It is also a narrow street, and to build a double street car track thereon will greatly impair its usefulness, there not being room between the curbing and the street car tracks for buggies and wagons to pass." That is the statement of a mere conclusion, and we are unable to judge of its correctness as an opinion without knowing the width of the street or the distance between the track and the curb. Section 1825, Rev. St. 1889, which was in force when this controversy arose, is in reference to building street railroads under

license from the city, and contains this clause: "Before taking or damaging any property in the construction of a railroad under such franchise, said corporation shall cause to be ascertained and determined the damages that will be done by the building and operation of such railroad, to the real and personal property situated on the route fixed by the ordinance defining such franchise, and shall pay to the owner or owners of the real and personal property so affected, or into court for them, the amount of their respective damages." It is contended on the part of appellants that this statute gives them a right to recover damages where none existed before. That view of the effect of this statute was urged with great force by learned counsel in *Ruckert v. Railroad Co.* (Mo.) 63 S. W. 814, but, after a careful consideration of the subject, this court came to the conclusion that that was not the correct meaning of the statute, and we are satisfied with the decision in that case. The opinion by Gantt, J., shows that, in conformity with the uniform rulings of this court both before and after the adoption of the present constitution, the damages to be ascertained and paid as contemplated in that statute were those peculiar to the plaintiff,—“different in kind, and not merely in degree, from those suffered by other members of the community.” It was also shown in that opinion that it has long been the law of this state that “the laying of a railroad track pursuant to authority granted by the city or the established grade of a street did not subject the street to a servitude different from that which was contemplated in the original dedication, and the damage to an abutting owner resulting from such use of the street was *damnum absque injuria*.” That is the doctrine in this state to-day, subject to the qualifications pointed out in *Lockwood v. Railroad Co.*, *Schulenberg & Boeckeler Lumber Co. v. St. Louis, K. & N. W. R. Co.*, and *Sherlock v. Railway Co.*, *supra*. The plaintiffs, in their petition, do not show that they have suffered or will suffer any damage peculiar to themselves. They do say that the defendants, preparatory to constructing the railroad, are depositing rails and ties, and are tearing up the street and obstructing its use, etc., and “thereby preventing these plaintiffs from going to and from their respective real-estate property over and along said Hamilton avenue,” etc. But those statements relate to the inconvenience resulting in the necessary work of construction, and are such as result in every street reconstruction. The damage resulting from the condition does not entitle the plaintiff to an injunction of the kind sought in this suit.

The demurrer to the petition was properly sustained, and the judgment is affirmed. All concur.

LOS ANGELES TRACTION CO. v. WILSHIRE *et al.**(Supreme Court of California, Feb. 28, 1902.)*

[67 Pac. Rep. 1086.]

Street Railways—Construction.

In an action on a note executed to a street railway company payable a certain time after the completion of its road, but with no time specified for the completion, a finding that the company "duly performed" the conditions required of it was equivalent to finding that it completed the road within a reasonable time.

Same—Same—Reasonable Time.

The question of reasonable time was for the jury, or the court sitting as such, on the evidence of the case.

Same—Same—Contract to Pay Reasonable Sum on Completion of Road—Unilateral Agreement—Validity.

A contract to pay a railway company a certain sum on completion of its road, though unilateral, became binding after the company had acted thereon and purchased a franchise, and the promisor could not rescind without restoring the company what it had paid out on the strength of the contract.

Same—Same—Same—Use of Portion of Track of Another Company.

A contract promising a certain sum to a street railway company after it should "build the road" to a certain place must be deemed to have been entered into with knowledge of Civ. Code, § 499, permitting two railways to use the same track for a certain distance; and therefore it was no defense to an action on the contract that the company did not "build the road," in full, but used a portion of a track constructed by another company.

Same—Same—Same.*

The company's use of the track of another company was a reasonable compliance with the contract.

Same—Same—Same—Compliance—Constructing Only Single Track around Corner.

The stipulation for a double-track railway was not violated by constructing a single track where the railway turned a corner.

Same—Same—Consideration.

There was no failure of consideration, the consideration being performed when the railway was completed.

Appeal—Review.

Where appellants promised a sum to a street railway company on completion of its road, and the court found that the company duly performed its agreement, the contention that its franchise was defective, without pointing out wherein the record disclosed any defect, will not be considered.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by the Los Angeles Traction Company against W. B. Wilshire and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Lee & Scott, for appellants.

E. H. Lamme, E. E. Millikin, and Camp & Lissner, for respondent.

GRAY, C. The action is based on a written instrument signed by appellants and reading as follows: "\$2,000. Los

*See 6 Rap. & Mack's Dig. 643.

Los Angeles Traction Co. v. Wilshire

Angeles, Cal., July 19th, 1895. Thirty days after the completion of the double track street railway of the Los Angeles Traction Company to the intersection of Seventh and Hoover streets, for value received, I promise to pay to the order of the Los Angeles Traction Company, the sum of two thousand (2,000) dollars, negotiable and payable at Citizens' Bank, with interest at the rate of eight per cent. per annum, payable after maturity. I further promise and agree to pay a reasonable attorney's fee if suit should be instituted for the collection of this note." The above instrument was placed in the hands of the Citizens' Bank, together with a duly signed written escrow agreement as follows: "To the Citizens' Bank Los Angeles, Cal.: Herewith is handed you by the undersigned the following named notes, to be held in escrow upon the terms and conditions herein stated: You are requested to hold said notes in escrow until the completion of the line of railroad of the Los Angeles Traction Company, now being constructed in the city of Los Angeles westerly on Eighth street to the vicinity of West Lake Park; thence by a route to be selected by said company westward on Seventh street, and by one or more streets to the intersection of Hoover street with Sixth street bounding the south side of the West End University addition to Los Angeles; thence west on said Sixth street to Commonwealth avenue; thence north on Commonwealth avenue to First street; thence west on First street to Virgil avenue. Upon completion and operation of the same with electric power, you are instructed to deliver said notes to said Los Angeles Traction Company. In case a franchise for such street car line to said Hoover street is not obtained by said Traction Company within ——— months from the date hereof, then, in that event, said notes shall be returned to their respective makers upon demand, to be canceled. Said notes are made by the following named persons, and in the sums set opposite their names." Then follow the names of the parties giving the notes, including the names of these appellants, who also signed the said agreement. The findings show that, on the faith of the foregoing instruments and other instruments of like character executed by other parties, who, like defendants, were the owners of property that would be made valuable by the construction of the proposed road, the plaintiff in November, 1895, less than four months from the execution of said instrument, bid and paid to the city of Los Angeles \$1,505 for a franchise to construct the road over that part of the course agreed upon and within the city limits. Before the 28th of April, 1896, the plaintiff commenced work upon said railway, but said work was not performed with the intention of prosecuting the construction of said railway continuously and with diligence to completion, and the plaintiff did not so commence work upon said railway with said purpose until after the 1st day of July, 1897. On July 1, 1897, defendants served upon plaintiff a written notice to the effect

that they did not recognize any liability on account of the foregoing written contracts, for the reason that the road had not been completed within the time agreed upon. Soon after the service of this notice the plaintiff actively engaged in the construction of the road, and completed it, and commenced operating the same to the intersection of Seventh and Hoover streets, as provided for in said instruments, before the expiration of the year 1897. Thereafter, and on May 17, 1898, plaintiff completed its railway to First and Virgil streets. Upon these facts plaintiff had judgment for \$2,000 besides interest and attorney's fees. Defendants appeal from this judgment and from an order denying them a new trial.

(Question of practice omitted.)

2. Appellants contend that, even admitting that there was no agreement as to the time for the completion of the road, yet the road should have been completed within a reasonable time. If this be conceded to be the law, it does not help appellants, for the findings are to the effect that plaintiff "duly performed all and singular the acts and conditions required of it" by the note as well as by the escrow agreement. "Duly performed" may well be taken to mean that it was performed within a reasonable time. This finding is as specific as the pleadings are on the question of reasonable time; as there is no allegation, in the answer or elsewhere, that the work was not done within a reasonable time. The answer contains a defense as to time, but this is based solely on the alleged oral agreement that the road was to be completed within a given period. Admitting, however, for the purpose of the case, that the question of reasonable time was properly before the court, still it was a question to be decided on the evidence presented, and the condition of the evidence in that respect is aptly illustrated by a quotation from the opinion of the trial court as follows: "Whether or not this road was completed within a reasonable time must certainly depend upon the character of the enterprise, the obstacles to be overcome, the length of time required by diligent and proper effort to do the work. This would include an inquiry into the topography of the country, the amount and kind of the work necessary to make the improvement. Courts do not take judicial notice, however, of topography or of the physical condition of the streets and the town. There is no testimony which would indicate the length of time reasonably required for this work; hence I am unable to say that the same was not completed within a reasonable time, even though we have this great lapse between the granting of the franchise and the completion of the road." *Quill v. Jacoby* (Cal.) 37 Pac. 524, involved a contract to build a levee as part of a contract for the sale of land. There was a delay of four years in the construction of this levee, and upon this question the court, speaking through Searls, C., said: "What was a reasonable time for the construction of the levee (conceding that question to be

involved) depended largely upon the magnitude and character of the work to be performed, and all the surrounding circumstances. The facts entering into the question were peculiarly within the province of a jury, or the court sitting as such, and in the absence of any allegation or proof of advantages which would have accrued to appellant, by an earlier construction of the levee, or of damages to him by the delay, we are not prepared to say that the finding of the court is contrary to the evidence. Non constat but that the fact that the last payment was deferred until the levee was completed may have fully compensated appellant for the delay."

3. The contract at the date of its making was unilateral, a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of \$1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason given for it was that the road was not constructed within the agreed time, when, as was determined subsequently by the court, there was no time agreed upon. Again, it came too late, after the obligations of the parties had become fixed.

4. The respondent purchased the right to and used the track of another street railway company, that had been previously built, for a distance of some 1,800 feet, and it is contended that this is not a compliance with the contract to "build the road." We think the contract must be held to have been entered into with full knowledge of the law contained in section 499, Civ. Code, which reads as follows: "Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." The contract was complied with when this section was complied with, as to the portion of the line of railway affected by said section. Leaving out of consideration the foregoing statute, we would say that the contract must receive a reasonable construction, and the company should be held only to a reasonable compliance therewith, and under this rule there is as little force

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in the contention based on the use of another company's track for a short distance as there is in the contention that the stipulation as to a double-track railway was not complied with for the reason that a single track only was constructed where the railroad turned a corner. The evidence was to the effect that this was the most practical and usual way to build a double-track street railway. As to both these points see *Railway Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97; *Stockton & V. R. Co. v. City of Stockton*, 51 Cal. 328; *Railway Co. v. Williams (Tex.)* 18 S. W. 206.

5. The views already expressed dispose of the contention that a failure of consideration was established. The consideration for appellants' agreement was fully performed when the road was completed.

6. There seems to be a contention, or at least an assumption, in appellants' brief that there was something wrong with the franchise obtained for respondent's road, but as the findings are to the effect that the contract was duly performed by respondent, and appellants fail to point out wherein the record discloses any deficiency in the franchise, we assume, without further consideration, that there is nothing in this contention.

7. We have examined the specifications of error in rulings upon the admission of evidence, and find nothing for which the case should be reversed. The evidence excluded on the objection of respondent consisted for the most part in acts and declarations of persons not parties to this suit, and not shown to be in privity with either of said parties, and of course this was properly excluded.

The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DETROIT CITIZENS' ST. RY. CO. v. BOARD OF PUBLIC WORKS
OF CITY OF DETROIT.

(*Supreme Court of Michigan, May 7, 1901.*)

[85 N. W. Rep. 1072.]

Street Railroads—Turnouts.*

Under an ordinance authorizing a street railway company to construct and maintain a single-track railway along certain streets, with the right to construct, use, and operate all necessary and convenient tracks for turnouts, side tracks, curves, and switches wherever the same may be necessary, the same to be constructed and in operation within one year from the date of the passage of the ordinance, *held*, that the relator was authorized to construct such turnouts, after the road was constructed, as should be made necessary by the increase of travel, without further legislative action on the part of the city.

*See generally, 23 Am. & Eng. Enc. Law (2d Ed.) 972 et seq.

Detroit Citizens' St. Ry. Co. v. Board of Public Works

Certiorari to circuit court, Wayne county; William L. Carpenter, Robert E. Frazer, Morse Rohnert, Joseph W. Donovan, and George S. Hosmer, Judges.

Application of the Detroit Citizens' Street-Railway Company for a writ of mandamus against the board of public works of the city of Detroit. Writ granted, and respondent brings certiorari. Judgment affirmed.

The Detroit City Railway was organized under chapter 167, Comp. Laws. In January, 1889, it was duly authorized by the city by ordinance to construct and maintain a single-track street railway along Chene and other streets. The ordinance authorized it "to construct, use, and operate all necessary and convenient tracks for turnouts, side tracks, curves, and switches, wherever the same might be necessary," the same to be constructed and in operation within one year from the date of the passage of the ordinance. It was constructed within the time. The relator is the successor by purchase of said railway, and operates it. On June 14, 1900, it presented a written application to the board of public works to put in four additional switches on Chene street, north of Gratiot avenue, to be placed exactly half way between the present switches. The application was denied solely for the reason that the authority of the board of public works to grant such terms was questioned by the common council. Thereupon relator filed a petition in the circuit court for the writ of mandamus to compel the board to grant its application. The writ was granted, and the case is now before this court for review.

Timothy E. Tarsney, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

GRANT, J. (after stating the facts). The sole power to convey authority to construct street railways is by the statute of the state vested in the municipal authorities; the authority in this case being the common council. Counsel for the city cite section 18 of the original ordinance, which reads: "If said grantees or their assigns shall fail to complete any of the aforesaid railways within the time prescribed, then the rights and privileges herein granted shall be forfeited as to any and every route therein established." He then argues that this provision and the requirement to construct the road within one year "would seem to be conclusive upon the right of the grantee or its successors to make any other constructions or use any other portion of the street than that which they actually utilized within the time limited." The charter provides that the common council "shall have power * * * to control, prescribe and regulate the manner in which the highways, lanes, alleys and public grounds and spaces within said city shall be used and enjoyed." By the charter all the legislative power over the streets is vested in the common council. The administrative power over them is placed

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in the board of public works. The council is authorized to legislate, and the board is authorized to execute what the council enacts. Charter, §§ 316, 317, 324. The common council had exercised its legislative function, and thereby defined the streets which relator might occupy, and the character of the track to be placed and maintained thereon. The contract between relator and the city was that relator might construct and maintain a single track, with such turnouts as should be made necessary by the increase of travel. No further legislative act was necessary to confer this right. This right was not limited to those needed at the time the road was constructed. Both parties contemplated that travel might increase, and thereby more cars and more turnouts would be rendered necessary. It is apparently conceded by counsel for the city—or, at least, it is not disputed—that these turnouts are essential for the accommodation of the public travel; nor is any objection made to the places designated. The sole contention is that the power to act lies in the common council, and not in the board of public works. If a new grant of power from the common council were required, it would follow that the roadbed as originally constructed must remain so during the life of the relator, unless amicably changed; for a contract cannot be changed except by mutual consent. As held in the able opinion of the court below, the relator's right at the time of construction to lay switches, etc., was limited by public convenience, and it would not then have been permitted to lay more than the then traffic demanded, and that, when public travel demanded more, relator could be compelled to lay it. Upon the construction to be placed upon these contracts, see *City of Kalamazoo v. Michigan Traction Co.* (handed down herewith) 85 N. W. 1067. We approve the conclusion and the reasoning of the opinion of the court below, and affirm the judgment. The other justices concurred.

JENSEN v. PHILADELPHIA, M. & S. ST. RY. CO.

(Supreme Court of Pennsylvania, Feb. 24, 1902.)

[51 Atl. Rep. 311.]

Corporations—Actions against—Venue.

A street railway corporation, whose roadbed, principal office, car barns, and rolling stock are in one county, may be sued in another, where its president and secretary reside, where part of its banking business is transacted, and where its secretary has its office, from which much of its correspondence is carried on, and in which its board of directors meet, the corporate seal is kept and used part of the year, its stock certificates are attested and issued, and its ledger account kept, and much other corporate business transacted.

Appeal from court of common pleas, Philadelphia county.

Action by Jens Jensen against the Philadelphia, Morton & Swarthmore Street Railway Company. From decree making absolute rule to set aside service of summons, plaintiff appeals. Reversed.

Jensen v. Philadelphia, etc., Ry. Co

Henry W. Scarborough, for appellant.

David Wallerstein, for appellee.

DEAN, J. The plaintiff in this case alleged he had been injured by the negligence of defendant company on the 2d of January, 1901, by running its electric car over his horse and wagon near the borough of Darby, in Delaware county. He brought suit in trespass for damages in court of common pleas No. 1 in and for Philadelphia county. The summons was served on Frederick W. Hammett, the president of the company, at his residence in the city of Philadelphia. The defendant was incorporated under the general street railway act of May 14, 1889. Its roadbed is wholly in Delaware county, and what it calls its "principal office," its car barns, and rolling stock are all within the territorial limits of the same county. The defendant took a rule to set aside the summons on the ground that it could not be legally served by a writ on its president issued and served in another than Delaware county. The court below made the rule absolute, and from that decree we have this appeal by plaintiff. No opinion was filed, but it seems to be conceded in the argument that the ruling was based on the case of *Bailey v. Railroad Co.*, 174 Pa. 114, 34 Atl. 556. It is well to consider just what that case decided. The defendant was a steam railroad 45 miles in length, located wholly within the limits of Lycoming and Sullivan counties. Its principal office was in Hughesville, Lycoming county, and it had no office elsewhere. The plaintiff in that case was injured in a collision on the railroad. She brought suit in Philadelphia, and served the writ on the treasurer of the company while he was on a visit, temporarily, at Philadelphia. On a rule to set aside the service, the court in Philadelphia made it absolute, and this court, on appeal by plaintiff, affirmed the decree. In that case the corporation had no office in Philadelphia, and transacted no business there. The location of its office and its carrying business were both within the counties named, as well as the residence of the treasurer. It was conceded in that case that at common law service could not be made on a corporation outside of the district where it existed, but it was sought to sustain the service under the provisions of the act of March 22, 1817, which enacts: "That suits may be brought against corporations by their corporate names, before any court or magistrate of competent jurisdiction, by summons, which may be served on the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation." P. L. 1816-17, p. 128. We held that this act did not extend territorially the jurisdiction of the courts of the different counties, but only designated in what courts of the respective counties suits might be brought against corporations, and what corporate officers might be served, and in what manner. That it was not the intention of the act to make good a service on an officer of such corporation in any part of the state where he

might happen to be within reach of a sheriff, without regard to where the corporation did business, or where its property was located, or where it had established corporate offices, or where it had its corporate existence. We further held that the act of June 13, 1836, only authorized a service on officers outside the county where the corporation was located when such officers were not residents of that county. The act of March 21, 1842, we held, was, in substance, similar in its provisions. And so all through the case of *Bailey v. Railroad Co.*, supra, the decision and reasons for it are based on the undisputed facts: (1) That the cause of action originated in the counties where the road was located and transacted its business. (2) Its office was there, and nowhere else, and all its officers resided there. (3) It had no office in Philadelphia, transacted no business there, had no property there, and consequently there was no legislation which authorized such service of summons by which defendant was brought into court in that case. That, however, is not this case. This corporation does do much business in Philadelphia, and has an office here. Its president resides in Philadelphia. Take the facts admitted in the deposition of Edward J. Hasse, secretary of the company. He resides in Philadelphia county, as also the president. The company has an office in the Bullitt Building, in that city, which is occupied by the secretary and the company's typewriter. Much of the correspondence of the company is carried on from that office. The board of directors meets there. The corporate seal is part of the year kept there, and there affixed to the corporate documents. Part of its banking business is transacted in Philadelphia county. Its stock certificates are there attested and issued. The company's ledger account is kept there, and much other corporate business is there transacted. While the roadbed is in Delaware county, and has there what the secretary calls its principal office, in which the stockholders meet, and where much other company business is transacted, these facts do not weaken the significance of the corporate acts done in Philadelphia county. The corporation, as an artificial person, really has a constant existence in both counties, and may be sued in either, if proper service in either case be had upon the proper officers. The facts in this case clearly take it out of the scope of the decision in *Bailey v. Railroad Co.*, supra, and we think the court below should have so held. Any doubt as to the legality of the manner of service on the president was not raised in the court below, nor is it questioned here; therefore we pass no opinion on that point.

The decree is reversed, and it is directed that the rule to set aside the service of the summons be discharged.

**CITY OF DALLAS *et al.* v. DALLAS CONSOL. ELECTRIC
ST. RY. CO.**

(*Supreme Court of Texas, March 6, 1902.*)

[66 S. W. Rep. 835.]

Taxation of Street Railways—Authority.

The charter of the city of Dallas (section 118) authorized the council to levy taxes upon the franchises and all other property of street railroads; section 135 authorized them to regulate the making of tax lists for taxation of all property within the city limits, and to collect taxes thereupon; while section 134 authorized them to assess the property and shares of "corporations, companies, banks, and such other institutions" as the same were assessed by the state law in such cases provided: *held* that, construing section 134 in the light of the statute in force when it was adopted relating to assessment of banking corporations, together with the course of legislation on that subject providing for a special method of taxing banking corporations, it was not intended to limit the power conferred by sections 118 and 135 to tax street railway company franchises to the manner in which they were taxed by the state, but merely to give the council power, if they wished to do so, to adopt the special state laws as to taxation of banking and like corporations.

Same—Authority of Municipality to Grant Exemption.*

Where a city, by ordinances, imposed upon a street railway company, as a condition for the granting of its city franchises, annual payments called "bonus," franchise tax," etc., which were not based on any property valuation, its power to impose an ad valorem tax upon such franchises, as authorized by its charter, was not thereby taken away, since, even granting that the ordinances imported a contract of exemption from taxation, there being no legislative authority for such exemption, such contract would be void.

Appeals—Review.

Any error in a ruling of the trial court cannot be reviewed in supreme court when not assigned as error in the appellate court.

Error to court of civil appeals of Fourth supreme judicial district.

Suit by the Dallas Consolidated Electric Street Railway Company against the city of Dallas and others. From a decree of the court of civil appeals (65 S. W. 201) reversing a decree in favor of the city, defendants bring error. Reversed.

W. T. Henry and J. J. Collins, for plaintiff in error.

Wood & Hudson and Finley, Etheridge & Knight, for defendant in error.

GAINES, C. J. This case was brought to the court of civil appeals of the Fifth supreme judicial district by a writ of error, and was transferred to the court of civil appeals for the Fourth district. The opinion of the latter court gives a clear and succinct statement of the case, which we adopt, and which is as follows: "Plaintiff in error, the Dallas Consolidated Electric Street Railway Company, instituted this suit to enjoin the city of Dallas and Ford House, its tax collector, from collecting a certain tax imposed by said city on its franchise as a street railway. The cause was tried by the court,

*See generally, 25 Am. & Eng. Enc. Law 606 et seq.; *Garrison v. City of Laurens* (S. Car.), 1 Mun. Corp. Cas. 581, and note, 590.

and resulted in a judgment dissolving the temporary injunction theretofore granted, and in favor of the city on its plea in reconvention for the sum of \$2,865.50. There being no statement of facts in the record, the findings of fact made by the trial judge must necessarily be adopted by this court as the facts proven on the trial. Plaintiff in error is a private corporation chartered by the laws of Texas, and permitted by the ordinances of the city of Dallas to operate its line of railway on certain streets. In the ordinances granting that right the street railway company was required to pay annually to the city certain fixed sums, designated in some of the ordinances as a 'franchise tax' and in others as a 'bonus,' and in others it is not given any specific name. The aggregate of the sums fixed in the ordinances amount to \$2,600 or \$2,700 annually. These sums were fixed regardless of the value of the property. It was also provided in the ordinances that all policemen and firemen of the city, while on duty, should be carried free of charge; and plaintiff in error has also been compelled by the city to pave and repair the pavement on the streets on which its cars are operated, the expense for such work to plaintiff in error during the years 1898 and 1899 amounting to \$8,000. An ad valorem tax was levied on the property of every description of plaintiffs in error for the years 1898 and 1899, and it rendered for taxation all of its property except the franchise, and the franchise was added to the list of property by the city assessor. The property rendered by plaintiff in error consisted of its real estate and all its tangible personal property. The contest in this case is over the sum of \$2,865 imposed by the city on what is denominated the 'franchise to operate and maintain lines of street railway' over certain streets." The trial court held that the plaintiff (the Dallas Consolidated Electric Street Railway Company) was liable for the tax, and dissolved the injunction. The court of civil appeals reversed this judgment, and rendered judgment for the plaintiff, making the injunction perpetual.

The leading question in the case is: Did the charter of the city of Dallas authorize the assessment of the franchise of a street railway company as a separate item in the rendition of its property for taxation? Construing our general laws in reference to the method of rendering the property of railroad companies for taxation for state purposes, we held in the case of *State v. Austin & N. W. R. Co.*, 62 S. W. 1050, 94 Tex. —, that the franchise of a railroad was not assessable as a separate distinct entity from its physical property. But we neither held that such franchise was nonassessable, nor that under the statutes then in question its value was not to be estimated in determining the valuation of the property of the company for the purposes of taxation. Here we have a different question. The city of Dallas is incorporated by special law, and the question is whether the charter of the city authorizes the tax

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of the cars, without the knowledge of the railway employees, and without any right, the law did not impose on the employees the duty of exercising any care to ascertain his perilous position before driving their engine against the cars.

Right to Leave Train on Switch Track.

A railway company has a right to leave a string of cars half a mile long standing on a track used for switching and storing cars, and is not negligent in doing so.

Personal Injuries—Direction of Verdict.

In an action for personal injuries, where the undisputed evidence not only fails to show negligence, but is such that reasonable minds can draw no other conclusion than that there was an absence of negligence, a verdict for defendant is properly directed.

Appeal from El Paso county court.

Action by Juan Flores, an infant, by his father, Cruz Flores, against the Atchison, Topeka & Santa Fe Railway and others, in which the son died pending the suit, and the father was substituted as plaintiff. Verdict directed for defendants, and plaintiff appeals. Affirmed.

Beall & Kemp, for appellant.

NEILL, J. This suit was originally brought on the 12th day of September, 1898, by Juan Flores, an infant, by his father, Cruz Flores, the appellant, for personal injuries alleged to have been inflicted by the negligence of appellees upon Juan. On February 19, 1900, the appellant, Cruz Flores, filed his first amended original petition, suggesting the death of his son Juan, and making himself the real party plaintiff. He alleged that since instituting the suit his son died, leaving as his only heirs the appellant and Sira Montez Flores, the deceased's mother. As his cause of action, the plaintiff alleged, in substance, that on the 23d day of June, 1898, the defendants, for the purpose of handling their cars and traffic, had a certain railway track within a few feet of where plaintiff and his family resided, in a populous part of the city of El Paso, where numerous persons and many young children lived; that the track for a distance of about a mile passed in front of where plaintiff's family and other people resided, and between it and the principal part of said city, to reach which from plaintiff's residence it was necessary to cross said track; that, going to and from the neighborhood in which plaintiff lived, the people and the public generally for a long time had been accustomed to cross said track, and had thereby acquired the license and permission of defendants to do so at or near the point where the accident occurred; that for several days prior to the injury, and at the date thereof, the defendants had negligently permitted to stand on said track, and in front of the settlement where plaintiff then lived, a string of cars, without openings between them, and close together; that the place where the cars were so placed was uninclosed and unguarded, and, with the cars so placed, attractive to children, and dangerous upon which to handle cars, without a proper lookout and precaution to guard against accidents to children.

The defendants knew that numerous people, with their families, and children of tender years, resided there, and also knew that the cars had been placed and had stood there, and that under the existing conditions it was necessary to use a high degree of care in moving said cars to avoid injury to persons crossing said track,—especially children; that there was no guard, lookout, or precaution used to avoid such accident; that on the date of the accident said infant was either attempting to cross the track, as he had a right to do under said license, or was playing on or near the track, having been attracted there by defendants' negligence in leaving the cars as they did on the said track; and that defendants, without giving signals of warning, or without having a proper lookout, moved the cars and ran over the child, which was then about six years of age, and so injured his arm that it became necessary to amputate the same at the shoulder. The defendants, after interposing general and special exceptions, which seem not to have been acted upon, answered by a general denial, and specially that if Juan was injured in the manner alleged by plaintiff, and if said injury occurred at said time and place, said track and cars belonged to defendants, and were where in law they had a right to be, and where they had been standing for many days prior to the accident; that, if Juan was injured, the injury was occasioned by his own act of negligence in going under one of the cars mentioned in plaintiff's petition, and placing himself in such a position as to be obscured from the sight of those who were in charge of and operating the engine and cars of defendants, that defendants, their agents and servants, did not see Juan while under the car, and it would have been impossible for them to have seen him unless they or some one had gone ahead and examined underneath each car in order to determine whether he was beneath the same; that Juan was not injured at a crossing, passway, or other place where he or the public had a right to cross or pass along said track, which track was in their yards in El Paso, and used daily for the purpose of storing and switching their cars; and that Juan should have known when he went beneath the car that the cars were likely to be moved at any moment, and, if moved, he was in danger of being injured by being run over by them. Upon hearing the evidence, the court peremptorily instructed the jury to return a verdict for the defendants, and it is from the judgment entered upon a verdict returned in obedience to such instruction this appeal is prosecuted.

Conclusions of Fact.

The evidence shows beyond question that on the 23d day of June, 1898, Juan Flores, the son of appellant, an infant about six years old, was injured by being run over by one of appellees' cars, in such a manner as to necessitate the amputation of his arm at the shoulder; that in the following February he died from what was supposed to be smallpox, leaving appel-

lant and his mother, Sira Montez Flores, his sole surviving heirs; that at the time and long prior to his injury the appellees owned and maintained, for the purpose of placing, storing, and switching on and from its cars used in the conduct of its business, a track about three-quarters of a mile long, situated in the city of El Paso, between the main business part of the city and where appellant, with his family, resided, and about 50 yards from his residence. There were about 10 families whose residences were constructed below and scattered along the entire length of the track, which separated them from the principal part of the city. There was no public crossing or pathway established by law or custom on this track. The people residing in the neighborhood of appellant, in going to the city, were accustomed to cross the track when they pleased at any place where it was convenient for them to do so, and sometimes would cross by going between or under cars standing and coupled together on the track. But there was no particular place along the track used by such inhabitants or others for crossing more than another. The evidence does not show that appellees or their servants knew that people were wont to cross the track by passing between or under cars standing upon it, as before stated, but they did know that people went across it in going from their homes to the city and returning. No consent, either expressed or that can be implied from their actions, was given by appellees to the public or people in appellant's neighborhood to cross said track anywhere along its entire length. Nor does the evidence tend to show that appellees or their servants knew that children of tender years were accustomed to play upon the track, or go under cars standing thereupon. When appellant's son Juan was injured, as before stated, a string of cars about half a mile long was upon the track in front of appellant's house, and, while the boy and his brother were under one of the said cars without any right or permission from appellees or their servants, an engine operated by appellees' employees, who did not know that Juan or any one else was under any of the cars, and had no reason to believe that he or any one was in much perilous position, without negligence, propelled the engine against said cars in the performance of their duty to appellees, thereby moving the string of cars and injuring Juan in the manner aforestated.

Conclusions of Law.

The question to be determined is, did the court, upon these uncontroverted facts, err in peremptorily instructing a verdict for defendants? To constitute negligence, it must be shown (1) that the defendants owed the injured party a duty; and (2) that they failed to exercise the degree of care required by law in the performance of that duty. *Railway Co. v. Morgan*, 92 Tex. 102, 46 S. W. 28. The appellant's son being a trespasser upon appellees' track without their knowledge or that of their servants operating the engine, the law

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did not impose upon them the duty of exercising any care to ascertain his position of peril before driving the engine against the string of cars he was under. *Douglass v. Railway Co.*, 90 Tex. 125, 36 S. W. 120, 37 S. W. 1132. That the appellees had the right to place and have their cars standing upon the track, and that they were not negligent in exercising this right, cannot be denied. *Railway Co. v. Rogers*, 91 Tex. 56, 40 S. W. 956; *Railway Co. v. Knight*, 91 Tex. 663, 45 S. W. 557; *Railway Co. v. Harris* (Tex. Civ. App.) 53 S. W. 600. When, as in this case, the undisputed evidence wholly fails to show negligence on the part of the appellees, or either of them, and excludes every reasonable hypothesis of its existence, but is such that reasonable minds can from it form no other inference or conclusion than that they were not guilty of negligence, it is the duty of the court to give the jury such an instruction as is here complained of by appellant. *Sanchez v. Railway Co.*, 88 Tex. 117, 30 S. W. 431; *Railway Co. v. Ryon*, 80 Tex. 59, 15 S. W. 588; *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; *Washington v. Railway Co.*, 90 Tex. 319, 38 S. W. 764; *Railway Co. v. Faber*, 77 Tex. 153, 8 S. W. 64; *Crawford v. Railway Co.*, 89 Tex. 92, 33 S. W. 534; *Haass v. Railway Co.* (Tex. Civ. App.) 57 S. W. 855; *Douglass v. Railway Co.*, *supra*.

The judgment is affirmed. Writ of error refused. Affirmed.

FREEBACK *v.* MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri, Division No. 1, Feb. 19, 1902.*)

[66 S. W. Rep. 965.]

Injury to Trespasser on Train—Evidence.

Where deceased was a trespasser on a freight train when killed, and was hiding between the cars, it was proper to refuse evidence, in an action for his death, that passengers were habitually allowed to ride on freight trains with the knowledge of defendant's employees.

Same—Same.

Where a petition for wrongful death avers that persons were carried on freight trains with full knowledge of defendant, it is proper to refuse, as irrelevant, evidence that persons were in the habit of riding, without objection, on freight trains, regardless of defendant's rules.

Same—Liability.*

Where deceased, when killed in a collision, was a trespasser on defendant's train, and the collision was the result of careless conduct of the engineer on one of the trains, defendant is not liable for negligently causing the death, since such engineer violated no duty owing to deceased.

Error to circuit court, Cass county; W. W. Wood, Judge.

Action by Lucy Feeback against the Missouri Pacific Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

*See *Merrieles v. Wabash R. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 158, and note, 169 et seq.

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Plaintiff sues to recover damages for the death of her husband, who was killed in a railroad wreck caused by the collision of two freight trains owned and operated by the defendant. The accident occurred at Adrian, in Bates county. The petition avers that it was the custom of defendant, its officers, agents, and employees, to carry "passengers and other persons on all its trains, including freight trains, and that on this occasion the plaintiff's husband was on the freight train that was wrecked, "with the permission, knowledge, and consent of the defendant, its officers, agents, servants, and employees," for the purpose of being carried from Butler to Harrisonville. By the plaintiff's evidence the following facts were shown: These two freight trains were to pass each other at Adrian. The north-bound train had the right of way, and the south-bound train, arriving first, switched onto the side track to clear the main track for the other train, which was due. After passing onto the side track the engineer in charge of the south-bound train stepped off his engine while it was moving, and went toward the depot to get his orders. The fireman was on the train, but whether he knew the engineer had left it or not does not appear. It was down grade, and the steam was not shut off, nor the brakes set, though the train was moving slowly. While the engineer was walking towards the depot, one of the witnesses said to him, "The fireman don't know you are off," to which the engineer replied, "He does." But witness repeated, "He does not." Then the engineer said, "Let him go to hell, then." But when the engine reached a point within about three rods of the main line, the engineer, seeming to realize the danger, ran to the train, and jumped on a car, and then ran ahead along the cars towards the locomotive. The fireman about that time reversed the engine, but it was too late. It had passed onto the main track, and the north-bound train, running at a rate of 18 or 20 miles an hour, struck it, and the wreck ensued. As soon as the engineer on the north-bound train discovered the other locomotive on the main track, it being then too late to avoid collision, he sounded the danger signal; and he and the rest of the train crew jumped off, and thus saved themselves. This north-bound train was what was called a "through freight." It consisted of 25 or 30 cars,—4 or 5 box cars next to the engine, a lot of coal cars, and a caboose at the end. The plaintiff's husband, in company with his brother and another companion, was at Butler, which is south of Adrian, when this north-bound train stopped there. He went to the caboose alone, and when he returned he told his brother and his other companion that he had asked the brakeman (the conductor not being there at the time) for permission to ride to Harrisonville, and the brakeman refused to allow him to get on the train. Then he and his brother and the other companion started walking up the track, and when the train came along, moving slowly, he climbed on it; taking

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a position on the front end of the front coal car, just in the rear of the box cars. The train stopped in a short distance, and two of the box cars were cut off and side-tracked, then the engine reattached to the train, and it moved on. When this stop was made, the plaintiff's husband got off and joined his companions, but when it started he got on again in the same position, the train moved on, and that is the last time those companions saw him alive. When the work of removing the wreck was going on, the cars were pulled apart, and his dead body fell down in the track. It had been crushed between the cars. The counsel for the plaintiff asked one of his witnesses this question: "Do you know of any parties riding backwards and forwards on the road there on this freight train?" to which defendant objected, the objection was sustained, and the plaintiff excepted. At the close of the plaintiff's case defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused. Then the defendant introduced evidence which tended to show: That the deceased came into the caboose at Butler, and asked to be allowed to ride to Harrisonville; the conductor at the time being in or about the depot. The brakeman told the deceased that this was a through freight, and did not carry passengers. Deceased said he had money to pay, but the brakeman still refused. That he then tried to get on the engine, and told the engineer that he had money to pay, but the engineer refused to allow him to get on. That none of the crew knew that he was on the train until his dead body was discovered when the wreck was being removed. At the close of all the evidence the court instructed the jury that the plaintiff was not entitled to recover. The plaintiff took a nonsuit, with leave, and, after due course, brings the cause here by appeal.

Geo. Bird and Jas. T. Burney, for plaintiff in error.

R. T. Railey, for defendant in error.

VALLIANT, J. (after stating the facts). 1. It is assigned for error that the court refused to allow the plaintiff to introduce evidence to the effect that passengers were habitually allowed to ride upon the freight trains of defendant, with the knowledge and consent of its employees. Evidence tending to show that passengers were allowed to ride on freight trains, with the knowledge and consent of employees, would not tend to show that persons were allowed to ride as the deceased in this instance was riding,—hidden between the front end of a coal car and the rear end of a box car. There was a caboose on this train, and, if passengers were allowed on the train, they would be in the caboose. In the brief for appellant it is said that the court erred in refusing evidence offered by plaintiff to the effect that persons were in the habit of riding, without objection, on the freight trains of defendant, regardless of the rules of the company. The plaintiff's offer did not include

evidence to show that the deceased was on the train regardless of the rules of the company. And if the offer had been made, it would have been irrelevant, under the averments of the petition, which were that passengers and other persons were carried on all the freight trains, even in flat or box cars, with the full knowledge and consent not only of the employees and servants, but of the defendant itself and its officers. And the petition avers that the plaintiff's husband was on this train, "with the permission, knowledge, and consent of the defendant, * * * for the purpose of going to Harrisonville." If he was there under those conditions, he was a passenger; and evidence tending to show that he was a trespasser, or that he was there with the connivance of the train crew, in violation of the rules of the defendant, would have been in contradiction of the petition. The court did not err in sustaining the objection to the evidence.

2. There was no evidence tending to show that the engineer or any of the crew of the north-bound train committed any breach of duty. The wreck was due to the act of the engineer of the south-bound train in leaving his engine, with steam on and brakes open, moving towards and near the point of contract with the train coming in the opposite direction. Whether or not that act was negligence, in the technical sense, as affecting the plaintiff's cause of action, depends on the answer that must be given to the question whether or not the engineer, in that act, failed to discharge a duty the defendant then owed to the plaintiff's husband under the circumstances of the case. The term "negligence," in its technical sense, embraces in its definition a failure to discharge a legal duty owing to the injured person. A right of action does not accrue to a plaintiff for an accidental damage sustained in consequence of the failure of a defendant to discharge a duty owing to a third person. *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333; 1 *Thomp. Neg.* (New Ed.) § 3. The legal duty here referred to may be assumed voluntarily, as by contract, or it may be imposed involuntarily by the relation of the parties and the environments. But unless the damage complained of arises out of a failure to perform a legal duty to the person injured, there is no cause of action. It is not necessary that the duty be owing to the person in particular. It is sufficient if it be owing to a class which embraces him, or to the public, where he is concerned. Now, what duty did the defendant corporation owe to the plaintiff's husband under the circumstances of this case? According to the petition, he was a passenger, and consequently the corporation owed him a duty to exercise a high degree of care for his protection. True, the petition does not call him by that name, but it declares that he was on a train of defendant's on which it usually carried passengers, and was there, with the knowledge and consent of the defendant, to be carried to his appointed destination on the defend-

ant's road. If that declaration were true, he was a passenger. But on the trial the plaintiff did not attempt to maintain that position, but contended that the conduct of the engineer in fault was so grossly negligent that the defendant was liable, although the plaintiff's husband was a mere trespasser. Thus the plaintiff is in the attitude of suing in one capacity, and trying to recover in another. But even a trespasser has some rights. If a man intrudes into your house when you have forbidden him to enter, you have no right to kill him, but you may expel him by using just sufficient force for that purpose. You owe him, under those conditions, the duty to avoid inflicting on him unnecessary injury. But if the man is secreted in a closet without your knowledge, and you are carelessly handling a gun, and allow it to be discharged and wound him, you are not liable, however careless you may have been; nor was your conduct negligence, in the technical sense. There is a difference between carelessness, in common parlance, and negligence, in the technical sense. The plaintiff's husband was a trespasser on the train, and the only duty the defendant owed him was to avoid inflicting injury on him wantonly. He had no share in the duty the engineer owed to the train crew or to possible passengers on the train. How can it be said, therefore that the careless engineer of the south-bound train neglected any duty he owed to this man, when he had no knowledge of, or reason to apprehend, his presence? It is argued by the learned counsel that the engineer knew that those trains habitually carried passengers, and therefore he ought to have apprehended that passengers were on this train, and his conduct was a reckless disregard of his duty in that respect. But disregard of a duty owing to passengers gives no cause of action to one who was not a passenger. The petition does not aver that the engineer had reason to apprehend that the plaintiff's husband was on the train in a position of extraordinary danger, where passengers do not ordinarily ride. If the case had been stated in the petition as it was made out by the plaintiff's evidence on the trial, it would probably have been ended on demurrer. There is nothing in the facts of this case to bring it within the doctrine announced in *Kellny v. Railway Co.*, 101 Mo. 73, 13 S. W. 806, 8 L. R. A. 783, and *Morgan v. Railroad Co.*, 159 Mo. 262, 60 S. W. 195, cited in the briefs. However careless the conduct of the engineer of the south-bound train may be considered, it cannot be adjudged to have been a violation of any duty the defendant owed the plaintiff's husband, and therefore it was not negligence for which the defendant is liable in this suit.

The judgment of the circuit court is affirmed. All concur.

MARTIN v. CHICAGO & N. W. RY. CO.*(Supreme Court of Illinois, Dec. 18, 1901.)*

[62 N. E. Rep. 599.]

Death by Wrongful Act—Sufficiency of Evidence to Show That Deceased Was Killed by Train.

In an action for death the evidence showed that about 12 minutes after the deceased left his home in the afternoon, and in good health, he was run over by a locomotive while lying on the track. He was lying with his face up at the time the engine struck him, and in the same position when his body was taken from under the tender. One of his feet had been cut off at about the ankle, and the other further up the leg; and the fireman testified that there was some muscular twitching when the body was first drawn out, but two other witnesses testified they saw no evidence of life. All the witnesses stated there was not a great amount of blood flowing. The pilot of the engine (the lowest part of the engine that passed over deceased) was about eight inches above the roadbed, and there was little, if any, evidence to show that the body was rolled by the train. There were several cuts on the head, but it did not appear whether the skull was crushed: *held*, that the question whether the death of deceased was caused by being run over by the engine was for the jury.

Accident on Track—Negligence—Question for Jury.*

The fireman of a locomotive saw deceased lying on the track when the engine was 1,400 feet distant. It was an offense for one not connected with the railroad, and in the discharge of his duty, to be on the track at that point. The engine was running about 18 miles an hour, and the fireman testified that he did not know when he first saw deceased that the body was a man, and said nothing to the engineer until the engine was about 360 feet away from deceased; that he then rang the bell, and the engineer applied the air brake and reversed the engine. Three engineers testified that the engine, if properly handled, could have been stopped within 100 to 125 feet: *held*, that the question of defendant's negligence was for the jury.

Direction of Verdict.

On a motion to direct a verdict in favor of defendant, the evidence most favorable to the plaintiff is to be taken as true.

Appeal—Findings.

Where on appeal the supreme court holds that in an action for death the question of defendant's negligence or the cause of deceased's death should have been submitted to the jury, such decision does not amount to a finding that on submission of such evidence the jury should find a verdict for plaintiff, but merely that if a verdict had been rendered for plaintiff the trial court would not have been warranted in setting it aside for insufficiency of evidence.

Trespassers—Duty to Look Out for at Point Where Ordinance Makes It an Offense to Cross.

Where railroad tracks are elevated above the streets, and a city ordinance makes it an offense for any one to be on them at such place, save those employed by the railroad and in the discharge of their duties, the fact that employees were in the habit of going across the tracks at that place would not raise a duty on the part of those operating the railroad's engines to be constantly on the lookout to conserve the safety of persons so using the track.

Error to appellate court, First district.

Action by Patrick E. Martin, administrator of the estate of James McDonough, deceased, against the Chicago & North-

*As to the duty of trainmen to look out for trespassers on track, see *Grady v. Georgia R. R. & Banking Co. (Ga.)*, 20 Am. & Eng. R. Cas., N. S., 400, and foot-note.

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western Railway Company. From a judgment of the appellate court affirming a judgment in favor of defendant (92 Ill. App. 133), plaintiff brings error. Reversed.

This is a case commenced in the superior court of Cook county by plaintiff in error to recover from defendant in error damages for the killing of James McDonough. The declaration contained three counts. The first avers that on the 16th day of January, 1898, plaintiff's intestate was in the employ of the defendant as a locomotive engineer, and earning \$140 a month, and that while he was crossing one of the defendant's tracks in the vicinity of Forty-Second avenue, in the city of Chicago, on his way from his home to the shops, where he was to take an engine on a trip for the defendant, while exercising due care and caution for his own safety, he was accidentally thrown or fell upon the track and rendered unconscious, and that the servants of the defendant, but not fellow servants, operating a certain locomotive engine, recklessly, carelessly, and negligently drove said engine over plaintiff's intestate, and inflicted injuries resulting in his death. The second count was like the first, with the additional allegation that by the exercise of ordinary care the servants of the defendant operating said engine might have discovered the said James McDonough's position upon the track in time to have avoided the injury, but that they did not exercise such care, but recklessly, wantonly, and negligently ran, managed, and operated said engine so that it ran over plaintiff's intestate, causing injuries resulting in death. Two additional counts were filed; the first setting out the employment and wages, and averring that while plaintiff's intestate was on his way to get his engine, preparatory to making a trip upon defendant's road, he was either thrown or fell upon one of the tracks, and was rendered helpless, and continued to lie upon said track, and that other servants of the defendant were operating and managing a certain engine, not being fellow servants of plaintiff's intestate; that it was in the daytime, the track in question straight and clear, and the defendant's servants operating said engine did discover plaintiff's intestate, and his position upon the track and his peril, in sufficient time, by the exercise of reasonable care, to have avoided the injury, but that they wantonly, recklessly, and negligently ran said engine over plaintiff's intestate, etc. A second additional count was filed and demurred to, and the demurrer sustained. Plea of not guilty. The cause came to a hearing, and at the conclusion of all the testimony offered by both parties the trial judge directed the jury to render a verdict in favor of the defendant. Judgment upon the verdict for costs. The case was taken to the appellate court on a writ of error, and there affirmed, and upon a certificate of importance by that court a writ of error is prosecuted from this court.

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James C. McShane, for plaintiff in error.

E. E. Osborn (Lloyd W. Bowers and A. W. Pulver, of counsel), for defendant in error.

RICKS, J. (after stating the facts). The facts disclosed by the record are that James McDonough, plaintiff's intestate, would have been 35 years of age his next birthday. He was 5 feet 10 inches in height; weighed 163 to 168 pounds; was a sober man, of good character and habits; had been married 8 years; had four children and a wife; had worked on defendant's road as a fireman and engineer for 14 or 15 years, and as engineer for 7 years. His wife testified that she had never known him to be sick in any manner, and that he had never had heart trouble. His run was to Janesville, Wis., and return. On the day of his death he came in on his run between 10 and 11 o'clock in the forenoon, ate his meal, and went to bed. He was called a little before 4 o'clock in the afternoon to go and take his engine and go out upon a run. He dressed himself, took his dinner bucket (which was a white tin bucket, 6x9 inches) and his overclothes, and left his home at 4:15 to go to his engine, which was at the roundhouse, somewhere near half a mile northerly of where he lived. He was a little late, and was in a hurry. On the north side of the railroad, and opposite his house, were the yards, shops, and engine roundhouse of the defendant. In these yards were a great many tracks that must be crossed, or in some way gotten around, to get to the stable where his engine was kept. Defendant's main line of road runs east and west along Kenzie street, and consisted of three tracks. The south track is for out-bound trains, the north one for in-bound through trains, and the middle one for freights and passing tracks. Defendant, in compliance with an ordinance of the city, had its main tracks elevated, so that they were 12 or 15 feet above the surface in the vicinity of the accident. At Fortieth avenue defendant had a station house, which the evidence tended to show was about this time, or prior to this time, abandoned. Around this station house were platforms, and the tracks were planked, so that the planking came up to the outer rail on the north and south sides of the road; but between the rails and between the several tracks there was no plank, but the space was simply filled in with gravel and sand. This station was on the north side of the tracks, and was reached by a stairway from the street. On the south side of the tracks there were also a gate and stairway. On this day plaintiff's intestate left his home, and apparently went up the stairway onto the platform opposite the station, and started across the track, and, for some reason not explained by the evidence, fell between the rails of the first track; his head lying against or close to the south rail, and his feet lying over the north rail; his lunch bucket and oversuit lying between the rails near him. An engine of defendant, drawing a caboose, in the charge of Samuel Cowan, as engineer, and Theodore J. Kirk,

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as fireman, started on an out-bound trip from somewhere near Western avenue, and going west. In the caboose were the conductor, Silas Harrison, and two brakemen. The engine was of the type known as the "Mogul"; had six drive wheels, 5 feet in diameter, with a double set of trucks ahead of the drivers. The tender had two sets of double trucks, all of which, except the front trucks of the engine, were equipped with the Westinghouse air brake, and the caboose had a hand brake at each end. At Hamlin avenue, about 1,400 feet east of where McDonough was lying, the fireman discovered an object on the track, which he says he did not then believe was a man, but which he watched continuously from the time he first saw it until the accident occurred; that from the time he first saw it he kept watching it, and said nothing to the engineer until he had reached a tower house, which was about 360 to 380 feet east of where plaintiff's intestate was lying, and says that at that time and place he saw the dinner pail, and saw enough to know that the object was a man, and then for the first time he informed the engineer that there was a man on the track. He states that at the time he first saw this object the engine was running from 15 to 18 miles an hour, and that it did not perceptibly decrease or increase its speed until the tower house was reached; that at the time he told the engineer there was a man on the track he rang a bell; that the engineer applied the air brake and reversed the engine; that he only gave the bell a ring or two; that no other signals or alarms were given, but he continued to watch the object; and that, from the time he first saw it until it was passed over, he did not see it move. The engineer could not say whether he opened the sand box or not. The engine was stopped just after it had passed over the plaintiff's intestate, the body lying between the front wheels of the tender and the rear drive wheels of the engine. The fireman immediately got out of the cab, and he and the conductor dragged the body from under the engine. Both feet were cut off, and the head had a large number of small cuts,—12 or 15,—apparently extending clear around it, and a large cut over one temple, extending down to the ear. The fireman states that there was a small amount of muscular tremor or twitching discernible when he first drew him out, and that that was the only evidence of life. The engineer and conductor testified that they saw no evidence of life whatever. Two or three persons saw the body immediately after the accident, and all the witnesses concur in the statement that there was not a great amount of blood flowing. Some of them fixed it at scarcely a perceptible amount, and others state that it was very noticeable. One or more of the bystanders testified that there was a pool of blood under the engine where decedent lay; that it was a foot or more across, and that a streak of blood could be seen from where the body was taken, to the platform of the railroad where it was laid. The undertaker testified that the

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underclothing—particularly the undershirt—was saturated with blood, the greater portion being in the back. The pilot was the lowest point of the engine that passed over him, and the testimony was that that was about 5 inches above the top of the rail, and, at least 8 inches above the roadbed; and there is little, if any, evidence tending to show that the body was rolled by the train passing over it. The condition of the clothing indicated that it was not. It was on Sunday, and there was about an inch of snow upon the ground, that had fallen a day or two previously. The day of the accident was clear and bright, and the body was struck by the engine about 4:22 o'clock in the afternoon. The wife testified that she learned of the injury within 15 minutes from the time her husband left home. The body was lying a little west of Fortieth avenue when it was struck,—as near as we can judge, 40 feet. The track was straight, and the view unobstructed. At Fortieth avenue there is a subway for passing through the railroad embankment, and the bents supporting the bridge over this subway extended up above the track a few feet; but they were not covered over,—in fact were not high enough to cover over and make a bridge over the railroad,—and were of a dark color, and, the engineer and fireman say, interfered to some extent with their vision. The evidence shows that there were other safer ways for McDonough to have gone to work, and why he went the way he did, and how he came to be lying upon the track, are not disclosed by the evidence. No trains but out-going trains used that track, and no other train had gone out that afternoon. No one saw him after he left home, and before the injury, except the engineer and fireman. The engineer testified that he did not see McDonough until after being notified by the fireman that there was a man on the track, and that after being notified he did all that could be done to avoid running over him, but that he was unable to stop the engine until it had struck him. Three engineers testified for the plaintiff—and it was admitted that a fourth one, who was not present, would testify the same thing—that they were expert in the handling of this sort of an engine, and that such an engine, traveling no faster than the testimony showed this was, if properly handled, could have been stopped within 100 to 125 feet. In view of the fact that the clothing of the decedent bore no evidence of his having been rolled by the engine passing over him, and of the further fact that as the engine approached him the fireman and engineer said that he was lying with his face up, and also that he was lying with his face up when taken from under the engine, it is difficult to account for the manner in which he was killed, and for the number of cuts shown to have been upon his head. No one knows how close his head was to the south rail. If it were very close, it would be cut by the flange of the drive wheels and crushed or bruised or cut. No autopsy was held, and it is not known whether his skull was crushed or not. One of

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his feet was cut off about the ankle, and the other further up the leg, and the cases are exceedingly rare where such an injury would produce such sudden death.

(Question of practice omitted.)

Defendant in error further contends that two things were necessary to be proved, to entitle the plaintiff to recover: First, that decedent died as the result of the injuries sustained; and, second, that such injury was due to the wrongful acts alleged in the pleadings,—and maintains that there is no sufficient evidence supporting either of these propositions to justify the court in submitting the case to the jury. Upon the first of these requirements, we have the evidence that within 10 or 12 minutes of the time the decedent was run over he had left his home, a block or two away, sober, in full possession of all his faculties, apparently as sound and well as he ever was, and generally in good health; that he was seen upon this track, lying down; that he was run over, and when he was taken up there were slight evidences of life, and blood flowed. Being shown to be alive so recently before the accident, together with the evidences following it, rises to more than a scintilla of evidence, and, we think, are matters about which prudent minds might differ. It may be that blood would flow, and twitchings of the nerves be present, and the fatal injury received before the engine in question reached decedent; but such questions as that are matters proper for the consideration of the jury.

Upon the second proposition, it had as well be assumed, for the purpose of this opinion, that the decedent was a trespasser upon the right of way of defendant, and that it owed him no duty until aware of his presence there, and of the fact that he was in peril. The evidence shows that when the engine was 1,400 feet away the fireman saw decedent. It is true, he says that at that time he had no idea that it was a man. It is also true that it was a place where the tracks were elevated, and where, by the ordinance of the city of Chicago introduced in evidence, it was a penal offense for any one to go, not connected with the railroad, and not in the discharge of his duty; and it can hardly be said that decedent was discharging a duty to the railroad in passing over these elevated tracks to go to his engine, when other and safer ways were provided. But was it not a fact that an object, such as would attract attention such a distance, so upon the track at a place where it would be least expected, was sufficient to put those in charge of the engine on inquiry? And was it not the duty of the fireman, when he saw the object in this strange and unusual place for an object of that size to be, to at least call the attention of the engineer to it at once, and not wait to speculate as to whether it was an animate object, which the engine might kill, or an inanimate object, which might derail the engine and kill those operating it? Can there be any doubt in a reasonable mind, if the engineer, who had not

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seen this object, and did not know of it until after he had passed the watch tower, had been advised of its presence at Hamlin avenue, he could and would have so put his engine under control that neither of the possible accidents could have happened? He did stop it within less than 300 feet, but it was then too late. In a number of cases we have held that it is not the duty of the railroad company, or its servants in charge of its engines, to keep a constant lookout to avoid injury to those who are trespassers upon its grounds. *Roden v. Railway Co.*, 133 Ill. 72, 24 N. E. 425, 23 Am. St. Rep. 585; *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50; *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112. And we have also uniformly held that, when those operating the engine do know that a trespasser is upon the track and in a position of peril, it is their duty to use reasonable care to avoid injury to him. *Railroad Co. v. Logue*, 58 Ill. App. 142; *Id.*, 158 Ill. 621, 42 N. E. 53; *Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218; *Railroad Co. v. Wren*, 43 Ill. 77; *Railway Co. v. Barrie*, 55 Ill. 226. In this case the track was shown to be entirely straight for four miles. The train was running west, toward the setting sun, and we are unable to see how the view of the fireman could have been interfered with by the bents that extended up the sides of the track at the crossing of the subway, as the setting sun at that time must have shone in almost a direct course in front of the engine. The knowledge of this fireman was the knowledge of the defendant, and if he neglected his duty when he had knowledge that decedent was upon the track, and did not notify the engineer in time to enable him to avert the injury, and could have done so, then it was a question for the jury whether the defendant was not guilty of negligence, and whether that negligence was not wanton and reckless, to the extent of willfulness. *Purcell v. Railway Co. (Iowa)* 80 N. W. 682, 77 Am. St. Rep. 557; *Railway Co. v. Bodemer*, *supra*; *Railroad Co. v. Logue*, *supra*; *Railway Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385; *Keyser v. Railway Co.*, 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405; *Railway Co. v. Barrie*, 55 Ill. 226; *Mekes v. Railroad Co.*, 56 Cal. 513, 38 Am. Rep. 67. We are not unmindful of the fact that there is a conflict in this evidence; but it was not the duty of the trial court, nor is it our duty, to weigh the evidence, and determine where the greater weight lies, or credence shall be given. Upon a motion such as this, the evidence most favorable to the plaintiff must be taken as true. *McGregor v. Reid, Murdock & Co.*, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332; *Hays v. Railroad Co.*, 20 C. C. A. 56, 74 Fed. 284. Nor are we called upon to find that this evidence should have been submitted to the jury, and that upon the evidence the jury should have found a verdict for the plaintiff. We go no further than to hold that, if a verdict had been rendered for the plaintiff upon this evidence, the trial court would not have been warranted

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in setting it aside for insufficiency of evidence to support it.

As this case may be tried again, it is proper that we should speak of another matter brought to our attention. During the progress of the trial the plaintiff offered to prove that other persons were, and had been for some time previous to the accident, in the habit of going upon this railroad at the place where plaintiff's intestate went. He states that his offer was to prove that those accustomed to use it were employees of the defendant. The first count averred due care on the part of plaintiff's intestate, but the bare proof that he or other persons were in the habit of going upon this railroad at a point forbidden to the public would not be sufficient to relieve him from the position of a trespasser. To raise a general duty of care from the defendant to plaintiff's intestate, it must be shown that he was there in the discharge of his duty to his employer, the defendant, or that it was necessary to go that way to reach his engine. *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50. In that case, in speaking of persons passing over tracks of railroads at places other than highways, we say (page 175, 163 Ill., and page 52, 45 N. E.): "It may be conceded that there are cases where evidence of the character in question may be admissible for the purpose of determining the nature of an act. The fact of general use by the public of a track, so as to create a probability of their presence, might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life, or a general disposition to do injury." But in view of the fact that this track was an elevated track, 12 or 15 feet above the street, and of the further fact that this offer was but to show that employees were in the habit of going across at that place, we do not think that fact alone would be sufficient to either show due care on the part of plaintiff's intestate, or raise a general duty on the part of those operating engines to be constantly on the lookout to conserve the safety of persons so using the track.

The judgments of the appellate court and of the superior court of Cook county are reversed, and the cause remanded for such further proceeding as the parties may elect. Reversed and remanded.

SOUTHERN RY. CO. v. JONES.

(*Supreme Court of Alabama, Feb. 13, 1902.*)

[31 So. Rep. 501.]

Carriers of Freight—Limiting Liability by Fixing Value of Horse—Public Policy.*

Where the bill of lading issued by a railroad company on receipt of a horse for transportation contains a stipulation that, in consideration of

*See *Gardner v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 82, and foot-notes, 83; 9 Cent. Dig., col. 579 et seq.; Id. col. 835 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 328 et seq.; Id. 458 et seq.; 1 Rap. & Mack's Dig. 761 et seq.; 2 Id. 175 et seq.

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reduced rates, liability of the carrier shall be limited to the value of the horse expressed therein, such stipulation is void as against public policy in case the value so stated is greatly below the true value, whether the carrier is informed of the true value or not.

Appeal—Review.

Where charges refused, appearing on the record of the trial court, are merely referred to in the bill of exceptions by number, but are not copied therein, the ruling of the court thereon cannot be reviewed.

Injury to Horse in Transit—Ownership.

Where plaintiff's agent, without disclosing his agency, shipped her horse over defendant's road under a contract in which such agent was named as both consignor and consignee, and the horse, while being so carried, was injured by defendant's negligence, plaintiff, as owner, may recover the damages for such injury.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Inez B. Jones against the Southern Railway Company. From a judgment for damages to plaintiff's horse shipped over defendant's road by her agent in his own name, defendant appeals. Affirmed.

Smith & Weatherly, for appellant.

Bowman & Harsh, for appellee.

McCLELLAN, C. J. (1) It is conceived to be settled in Alabama on principles of public policy that a common carrier cannot contract at all for immunity from liability for the loss of or injury to property resulting from his own or his servant's negligence. (2) It is conceived to be settled in this state also that, in consideration of reduced freight charges and the like, the shipper and the carrier may contract that, in case of loss or injury, whether resulting from negligence or other cause, the value of the property at the time and place of shipment, not exceeding an expressed sum, shall be the measure of recovery. And (3) it has also been declared by this court that under such contract recovery will be limited to the sum so expressed, unless the real value of the property is greatly disproportionate thereto,—so much greater than the stipulated maximum of value and liability as to render the contract unreasonable, and therefore not binding on the shipper. We have no doubt of the correctness of the first proposition. Of the soundness of the second the writer has always had the gravest doubts. Indeed, if it were an open question, he should adopt the views expressed in the dissenting opinion of Manning, J., in *Railroad Co. v. Henlein*, 52 Ala. 606, 616, 23 Am. Rep. 578. He does not see how this proposition can logically stand with the first stated above. But, conceding it to be settled, the limitation upon it embraced in the third proposition shears it to a large extent of its evil tendencies and possibilities, and brings the law back toward the salutary and true doctrine that common carriers cannot stipulate, under any circumstances, against liability for the consequences of their own negligence; and we are of opinion that while, under our adjudications, the carrier, in consideration of reduced

freight charges, may agree with the shipper that in case of loss or injury the recovery shall be limited to a valuation of the property expressed in the bill of lading, and that such agreement will be enforced by the courts when such valuation is not greatly below the real worth of the property, such agreements will not be countenanced or given effect if they are unreasonable,—if they limit damages for loss or injury to an amount greatly less than the damages in fact sustained. It is plain that this doctrine must be rested upon the same ground that underlies the original proposition forbidding agreements against liability for the results of negligence,—public policy. And in determining whether a stipulation is void as being against public policy there is no room for inquiry into the knowledge, information, or intention of the parties. The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil, or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and the duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a matter of governmental concern that he should be allowed to make such stipulation under any circumstances; and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew or had been informed, as to the real value of property transported by them. The application of the foregoing views to the case in hand brings us to the conclusion that the trial court did not err in overruling the demurrer to the replication to the fourth plea, nor in those parts of the general charge to which exceptions were reserved, nor in refusing to give charges 2, 3, and 6 requested by the defendant.

It is stated in the bill of exceptions that "defendant requested the court to give the following written charges, numbered 1, 2, 3, 5, 6, 7, and 8, namely." Here charges 1, 2, 3, 5, and 6 are set out, but not 7 and 8, nor any other charge. The bill of exceptions concludes, "But the court refused to give each of said written charges," etc. As part of the record proper of the trial court, under the heading "Defendant's Refused Charges," seven charges are copied into the transcript, each indorsed: "Refused. A. A. Coleman, J." These are not numbered, but the first five of them severally are the same as the five charges which appear in the bill of exceptions. The remaining two, we suppose, are the charges referred to in the bill of exceptions as charges 7 and 8. But

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whether these two charges are sufficiently identified as being those numbered 7 and 8, referred to, but not copied in the bill of exceptions, is not material. Not being copied in the bill of exceptions, the ruling of the court upon them cannot be reviewed. *Nuckolls v. State*, 109 Ala. 2, 19 South. 504.

This is an action *ex delicto*, sounding in damages for an injury to plaintiff's horse, tortiously inflicted by defendant's servants. Any person proximately injured by the commission of a tort may maintain an action for the wrong and injury. True, there was averment that the defendant undertook, as a common carrier, to transport the horse from Anniston to Birmingham, and there was proof that this undertaking was under a contract made by defendant with one Boam, who was in possession of the animal as bailee of plaintiff, and who was both consignor and consignee. But all this went merely to show that defendant was under a duty to exercise due care in carrying the animal as a predicate for the conclusion, in connection with averment and proof of its failure to exercise due care,—its negligence,—that it had tortiously injured the horse, and thereby damaged its owner, the plaintiff. And the action was in no sense upon the contract between defendant and Boam, but for a wrong and injury done to the plaintiff by the defendant, one element of which was that defendant had possession of plaintiff's property under circumstances which imposed upon it the duty of conserving its safety and well-being. There is, we therefore conclude, no merit in the tentative insistence of appellant's counsel that the owner of the property could not recover for defendant's negligence because the animal was being carried under a contract with Boam, and defendant had no notice that Boam was acting for the plaintiff.

The points to which we have adverted are the only ones discussed in the brief for appellant.

Affirmed.

LOUIS AUGUSTE MARANDE *et al.*, Plffs. in Err., v. TEXAS & PACIFIC RAILWAY COMPANY.

(Argued January 8, 9, 1902. Decided February 24, 1902.)

[22 Sup. Ct. Rep. 340.]

Loss of Cotton by Fire—Origin of Fire—Question for Jury.

The question whether cotton was set on fire by sparks from a locomotive is for the jury, where the cotton was stored in and along the side of open sheds in close proximity to railroad tracks on each side, although the only locomotive near the cotton on the day that the fire was discovered did not go near the shed where the fire started, and is not shown to have been throwing out any sparks, while, if there had been any, the wind would have carried them in the opposite directions, since one possibility is that the fire was set by other locomotives on a preceding day, and smouldered until the day it was discovered.

Same—Negligence—Inadequate Watchmen.

Whether a lack of sufficient watchmen contributed to the loss of cotton by fire is a question for the jury, notwithstanding the contention

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that the watchmen actually present discovered the fire as soon as it started, where it is possible for the jury to infer that the fire might have been smouldering for a considerable period before its discovery, and a sufficient force of watchmen, if present, might have materially aided in extinguishing the fire.

Same—Same—Inadequate Fire Apparatus.

Whether the negligence of a railroad company in failing to provide proper facilities for extinguishing fire in cotton sheds contributed to a loss of the cotton by fire is a question for the jury, where the cotton was piled up high around the platforms on which hose was kept, and when an attempt was made to use the hose the water would not come, either because the hose had become tangled, or otherwise, and the valve was found already open when one of the men tried to open it, although the railroad company contends, but without any positive proof of the fact, that one of the employees had opened the valve and tangled the hose after the alarm of fire,—especially when there had been no systematic inspection thereof, and no fire drill had, and no instructions given as to the use of the apparatus.

Deviation of Shipment to Port for Export.

No deviation from the route of a shipment of cotton from Texas to the port of New Orleans for export is made by the carrier's delivery of the cotton at its terminal wharf at Westwego, a few miles above, and on the opposite side of the river from, New Orleans, but outside of the limits of the municipality or of the port, as defined by statute.

In Error to the United States Circuit Court of Appeals for the Second Circuit to review a decision affirming a judgment of the Circuit Court in favor of defendant in an action to recover for cotton destroyed by fire. **Reversed.**

See same case below, 42 C. C. A. 317, 102 Fed. 246.

Statement by MR. JUSTICE WHITE:

This action was commenced to recover from the Texas & Pacific Railway Company the value of 65 bales of cotton destroyed by fire on the night of the 12th of November, 1894, whilst the cotton was in the cars of the railway company standing on its tracks in the rear of or in close proximity to a terminal wharf of the corporation situated opposite the upper portion of the city of New Orleans, on the west bank of the Mississippi river, at a point called Westwego. The cotton formed part of 100 bales shipped from Greenville, Texas, on the 29th of October, 1894. An export bill of lading was given by the Sherman, Shreveport, & Southern Railway Company, that Company purporting to act, not only on its own, but also on behalf of the Texas & Pacific Railway, and of the Elder Dempster & Co. steamship lines. The bill of lading provided for the carriage of the cotton from the point of shipment "to the port of New Orleans," and thence by the steamship line to Havre, France, and contained numerous conditions and exceptions, one of which exempted the carrier from all loss occasioned by fire. Responsibility of the railway company for the value of the cotton destroyed by fire, although at the time of its destruction it was in the possession of the railway under the bill of lading, was based on the assumption, first, that the fire was due to the negligence of the corporation; and, second, that the carriage of the cotton to the terminal

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wharf at Westwego, for transshipment there to the steamship line, was a deviation, and hence the railway company was not entitled to avail itself of the exception against loss by fire.

Upon issue joined, a trial was had in the circuit court. After the plaintiffs had introduced their testimony and rested their case, the defendant requested the court to take the case from the jury by giving a peremptory instruction in its favor. This was asked on the ground that there was no proof sufficient to go to the jury, either as to the alleged negligence, or the asserted deviation. The court granted the request, and exceptions were duly saved by the plaintiffs. From the judgment entered on the verdict the plaintiffs prosecuted error to the circuit court of appeals from the second circuit, and in that court the judgment was affirmed.

The case being one depending not solely on diverse citizenship, the defendant corporation being chartered by an act of Congress, the plaintiffs prosecuted error to this court.

Messrs. Treadwell Cleveland, Frederick E. Mygatt, and George Richards for plaintiffs in error.

Messrs. Rush Taggart and Arthur H. Masten for defendant in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

Questions involving the liability of the defendant for damage occasioned by the loss of other cotton by the fire which destroyed the cotton, the value of which is now sought to be recovered, have been previously decided by this court. *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. Ed. 725, 19 Sup. Ct. Rep. 421; *Texas & P. R. Co. v. Reiss*, 183 U. S. 621, ante, 253, 22 Sup. Ct. Rep. 253; and *Texas & P. R. Co. v. Callender*, 184 U. S. —, ante, 257, 22 Sup. Ct. Rep. 257. Whilst in deciding these cases it was essential to refer to, and in some respects consider, the course of business at the terminal wharf at Westwego, the controversy which here arises for decision involves different considerations, and causes it to be necessary to more fully refer to the establishment of the wharf at Westwego and the course of business at that place prior to and at the time the fire occurred.

In the circuit court of appeals there were a number of assignments of error; now, however, only four of such assignments are pressed; the 1st, the 12th, the 13th and the 14th. As the 1st of these only complains generally that the circuit court of appeals erred in affirming the judgment, and the 14th is a mere reiteration of the 1st, the only assignments which we are called upon to consider are the 12th and the 13th. The one asserts that the case should have been allowed to go to the jury on the issue of deviation, the other that error was moreover committed in not permitting the plaintiff to go to the jury on the general question of the loss of the cotton by the negligence of the defendant railway.

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In order to pass upon the issues arising on these assignments, the evidence must be considered. In taking it into view, however, we shall do so only to the extent necessary to enable us to decide the question of law which arises, that is, Was the evidence sufficient on the subject of negligence and deviation to go to the jury?

Approaching the city of New Orleans, on the opposite or right descending bank of the Mississippi river, the track of the Texas & Pacific Railroad terminated prior to 1873 at a point called Gouldsboro. There the company had a railway yard, roundhouse, and other structures. It there also had a terminal wharf with an incline, by means of which its cars could be transferred directly across the river by boat to a depot and yard belonging to the company situated at the foot of Thalia street, at about the center of the river front of the city of New Orleans. At the Thalia street depot freight for New Orleans was delivered, and that intended for further transit by way of export or otherwise was also delivered in carload lots over connecting tracks, or, where this could not be done, was hauled and delivered at the expense of the railway to the steamship or other carrier. Prior to 1873 the proof tended to show, at a point some 6 or 8 miles above Gouldsboro, a spur track left the main track of the Texas & Pacific road, and extended for about $\frac{1}{2}$ mile in length to Westwego, on the bank of the river. Before 1873, however, the proof showed that none of the inbound traffic was carried on at Westwego, though at that point probably some outbound freight, intended for the purposes of the railroad, may have been received at Westwego. Some time in 1873 the company constructed a grain elevator at Westwego, and built a terminal wharf at the same point. The proof gives no description of the elevator wharf, except that it was below the freight wharf and connected with it, but the freight wharf is fully described, there being no material variation in the testimony on the subject.

The wharf was built on the bank of the river. It was constructed on piles and stood above the water, the piling having placed on it beams and joists upon which planks were nailed, constituting a flooring which had very narrow spaces between the planks, as they were not tongued and grooved. The wharf was about 800 feet, stretching up and down the river front, and was somewhere between 350 to 400 feet in depth, that is, running back from the river front to where it rested against the bank. On this wharf were constructed two freight sheds, the one designated as No. 1 began some short distance above the lower end of the wharf, and extended up for a length of between 250 to 300 feet. At a short distance, above the upper end of this shed, the flooring on the wharf ceased, and there was an open space about 50 feet, extending up the wharf, and which was near about the width of the shed; in this place the piling had been driven and the joists and beams placed, but no flooring was laid. Beyond this open space there was

built shed known as No. 2, of the same dimensions as the lower one. Both of these sheds were wooden structures raised on posts placed in the wharf, entirely open at each end and at each side. The roof commenced at about 20 feet above the flooring of the wharf, and was surmounted by a cupola running the entire length of each shed, which was covered with a lattice or wooden work like a wooden shutter. The number of the rows of posts in each shed is not made clear in the proof, but it tended to show that the posts were somewhere between 20 and 30 feet apart. About 8 to 10 feet in front of both of these sheds along the wharf was a railroad track, which entered the wharf from the lower end, and extended to and beyond the extreme upper end of shed No. 2. Between the outer rail of this track and the river front there was a space on the wharf of about 30 feet. Behind the sheds were two railroad tracks running the entire length, and extending above the upper end of No. 2 shed, somewhere between 50 and 100 feet.

Westwego was not within either the municipal limits of the city of New Orleans, or the limits of the port of New Orleans, as defined by statute. It was shown that the season of active cotton receipts in the city of New Orleans commences about the 1st of September and ends about May of each year, and that the Westwego wharf was completed in time to enable the railway company to avail of its facilities for, if not the whole, at least a portion, of the business of the cotton season of 1893 and 1894. After the construction of the wharf in the season in question the great bulk of cotton handled by the Texas & Pacific Railroad under export bills of lading was deflected from its main track at the Westwego spur track, carried to the terminal wharf, and there unloaded and transhipped. This the proof showed was the course of business also as to all export cotton in the following season of 1894 and 1895, up to the time of the fire, except, perhaps, as to small lots of cotton intended for export, where the number of bales would not justify the coming of a steamer to the wharf at Westwego, in which case the cotton was carried to Gouldsboro, transferred, and delivered. In arranging to carry export cotton the course of business was this: The Texas Pacific Railway would contract with steamship lines for the carrying of a given quantity of cotton at a stated price, and under these contracts would then, through either itself or through other carriers at various points of original shipment, issue through bills of lading, embracing both railroad and water carriage. The method pursued by the railway to bring about the formal delivery to the steamship lines of the export cotton at the Westwego wharf after its arrival is fully stated in the case of *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. Ed. 725, 19 Sup. Ct. Rep. 421. It was shown that under the contracts made by the railway with the steamship companies there was always an understanding that the ships would not be obliged to suffer the expense of moving from their own docks, usually

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in the city of New Orleans, to the Westwego wharf, for the purpose of loading cotton, unless a sufficient amount, variously stated at from 1,000 to 2,500 bales, was on hand for delivery.

It appears that other railroads possessed terminal wharfs on the river, some of them being outside of the municipal and port limits, and that they were used as a depot for the shipment of through billed export cotton, under methods of business substantially similar to those at Westwego. The export cotton intended for transshipment at the Westwego wharf was thus handled: On arriving in the vicinity, the cars were usually, in the nighttime, switched to the tracks running in the rear of the wharf beside the open sheds, and the cotton would then be unloaded and stored in the sheds, whence, when called for, it was delivered to the steamships. The track running the length of the wharf in front of the sheds was principally used for the bringing in of freight intended for shipment by water other than cotton. The cars containing it would be drawn or pushed by a locomotive along the track, and the freight would then be moved from the cars to the vessels.

During the cotton season of 1894 and 1895 (prior to November the 12th, 1894) labor troubles of a serious character occurred at the docks in the city of New Orleans. The disturbances, the proof tends to show, caused delay in the movement from the port of New Orleans of export cotton. Either because of this fact or because of an unusually large cotton crop, or an unexpectedly rapid movement of cotton to the seaboard by the Texas & Pacific lines, large quantities of export cotton accumulated in the sheds on the wharf at Westwego. The cotton, which was all compressed, was stored in the following manner: The bales were piled between 15 and 20 feet high throughout the whole space of the shed, but probably three, and certainly not more than four, narrow gangways being left in each shed, running from front to rear. There was no possible doubt from the evidence that no gangways were left running lengthwise of the sheds. There was also proof tending to show that these narrow gangways, as the cotton accumulated, were obstructed by bales of cotton standing endwise. The proof also tended to show that the accumulation of cotton became so great that on the river front of the sheds, in the open space towards the railroad track, cotton was also placed, approaching so close to the railroad track, that as an engine moved along carrying or pushing cars containing freight intended for shipment there was not sufficient space between the cotton and the track to enable a person to stand with perfect safety. It appeared that around the open space between the upper end of the No. 1 and the lower end of the No. 2 shed cotton had also been piled. It was shown that most, if not all, of the cotton exposed as stated was not covered with tarpaulins, and no other means were resorted to to protect it from the danger of fire arising from

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the operation of the locomotives in the rear and front of the sheds and among the cotton on the wharf.

Westwego was remote from any town or village having a police force or a fire department. The wharf exclusively belonged to the railway company, and was under its control; property on it, therefore, had the benefit of no police protection except that afforded by the company, and in case of fire had nothing to rely upon except the men and appliances which the company furnished. The fire appliances were as follows: There was a tank near the grain elevator standing at such a height as to afford adequate pressure. This tank was supplied by a pump drawing its water from the river. From the tank a pipe ran to the wharf and passed under the floor of each of the sheds. In each shed there were three hydrants or water pipes, in the middle of the shed—about equidistant; they were by the side of the posts, and stood 6 feet above the floor. On each of the six posts by which the hydrants stood and connected to them there was a platform 6 or more feet above the floor, on which was placed 100 feet of coiled hose. A witness testified that some months or more before the fire he had seen hose stretched along the front posts of the shed resting on pieces nailed to such posts, but there was other testimony tending to give rise to the reasonable inference that no such hose was there at the time of the fire. The testimony on this subject, however, had no relation to the hose coiled on the platforms on or around the posts where the hydrants were situated. This is conclusively the case, since the witness who testified as to hose being stretched as above stated spoke only of the front, and said he had not observed the hydrants and their condition, and knew nothing of them. We say this in passing, because in the argument for the defendant in error it is suggested that the testimony of the witness in question related to the hose at the hydrants, and was all the testimony on the subject in the record, overlooking the clear and cumulative testimony that the hose, at the hydrants, was connected with them and coiled on a platform on or around the posts about 6 feet above the floor. The evidence left it uncertain exactly where the valve was placed which opened the connection with the water. The proof tended to show that the valve was either under the floor with an opening to reach it, or just above it, at the base of the hydrant pipe. As the three hydrant pipes in each shed stood beside the posts, and the gangways running from front to rear, although very narrow, were shown not to be obstructed by the post, it was therefore inferable from the proof that the posts where the hydrant pipes stood had cotton piled around them. Indeed, this inference was sustained by direct evidence tending to show that the posts near which the hydrants stood had cotton piled around them from 12 to 15 feet high, and there was also proof tending to show that in some instances the cotton so piled had fallen over on the hose on

the platform, and the bale which did so had to be removed.

There was testimony tending to show that along the front and rear of the sheds there were barrels containing water with buckets hanging near. It was shown without contradiction that there were no chemical fire engines, although there was testimony tending to show that what were designated as chemical fire buckets had been bought at about the time the wharf was built, and there was conflict in the testimony as to whether these buckets were on hand for use at the time of the fire. The evidence tended to show that no general directions as to handling or the use of the hose in case of fire had been given, that no fire drill had ever taken place, nor had the men in charge of the wharf been ever instructed in any way as to the use of the apparatus which has just been described.

The wharf in the daytime was under the direct authority of an employee designated as chief clerk; in the nighttime it was in the charge of one regular employee of the company and three watchmen, who were the members of a special private police force in the city of New Orleans, the railway company contracting with the head of the special police organization for the services of the three men at the wharf, and a like number of men were on watch during the daytime. In other words, in the nighttime the wharf was in charge of but four men, one a regular employee of the company, and three special policemen employed as just stated, and their duty extended over the whole surface of the wharf and sheds, as well as under the wharf.

A short while prior to November 12, growing out of supposed danger resulting from fear of election disturbances, the force at the wharf was increased by a few men, whose duty it was to patrol the space under the wharf and prevent persons from entering by boats or otherwise. This force, prior to the fire, had been reduced to the number previously stated.

It was shown that at a wharf in the city of New Orleans belonging to a steamship company where cotton had accumulated, the force of watchmen employed was largely in excess of the number at Westwego, and that at a terminal wharf of another railroad, where there was about half the quantity of cotton which was on the wharf at Westwego at the time of the fire, there were twenty-five watchmen employed instead of four, the number at Westwego; that there were Babcock fire extinguishers, hose placed on reels ready for use, and that this hose was used almost daily for the purpose of washing down the wharves, and to enable the men in control to be familiar with its use in case of emergency.

By about the middle of October, 1894, the accumulation of cotton at the wharf of Westwego had been so great that the proof showed that the railroad officials had become solicitous on the subject, and deemed that they were in great risk of fire. It was also shown that about that date a destructive fire had occurred in a wharf where cotton was stored in the city

of New Orleans, presumed to be the result of the labor disturbances, and that at Westwego, during the daytime, within a period not remote from the general conflagration which ensued, subsequently, the longshoremen working there had discovered a fire smouldering in a bale of compressed cotton which was in the tiers, and that it had been extinguished by throwing down the cotton and removing the bale; and that this fact had been reported to the officers of the company. Prior to Monday, the 12th of November, 1894, cars loaded with cotton were being brought in in the nighttime in the rear of the sheds, and for days prior to that date vessels had been loading in front of both of the sheds, some with cotton and some with other products. On the 12th of November two steamers were at the wharf; one about abreast of the lower end of No. 1 shed, and the other opposite the upper or No. 2 shed; that for the purpose of bringing in the cargo taken by these ships, a locomotive was operating among the cotton on the wharf in front of the shed, and was passing back and forth on the track, pushing cars containing the freight to be loaded. Although there was some proof indicating that on that particular day the locomotive which entered from the lower end of the wharf proceeded up the track abreast of No. 2 shed, we assume, for the purposes of this opinion only, that it was shown that the locomotive was pushing so many cars ahead of her that she did not get abreast of the No. 2 shed. There was no proof that the locomotive, in operating along the front of the wharf, was emitting sparks from her smokestack or dropping cinders from her fire-box.

There was evidence as to the direction of the wind on the 12th of November. The parties asserting that opposing inferences were to be deduced therefrom, but, without undertaking to consider this controversy, we assume, only for the purpose of this opinion, that the result of this proof as to the direction of the wind tended alone to show that if a spark had been emitted from the locomotive operating on the front of the wharf, as above stated, the wind would have carried it away from the No. 2 shed, where the fire subsequently broke out, as we shall hereafter state.

On Monday, the 12th of November, 1894, the accumulation of cotton was so great that there were stored in the sheds and on the wharf in the manner which we have indicated, about 20,000 bales of compressed cotton, and there were in cars, standing on tracks in the vicinity of the wharf and sheds, about 8,000 bales more, awaiting storage room. The cotton sued for was among the latter. On the evening of the date above mentioned, shortly after the day force had ceased work and the four night watchmen had come on duty, the cotton was discovered to be on fire. The flames spread rapidly, and a disastrous conflagration followed, with the result that most of the cotton in the sheds and the sheds themselves, as well as cotton in the cars in the vicinity, among which was that sued

for, was destroyed. What took place at the time of the discovery of the fire was testified to by only one witness, one of the night watchmen, Robeau, who was one of the three special officers of the private police agency. His statement of what occurred may be thus summarized: His place of duty was at the upper or No. 2 shed, and his business was to pass around and through the shed, and at designated intervals register his presence upon a watchman's clock. After sending a telephone message to indicate his presence at his post, and whilst he was on the river side of shed No. 2, at the lower end, he heard a cry of fire. Running immediately to a gangway, he crossed to the rear or wood side of the shed. Not seeing the fire, he ran up the rear side and across by a gangway to the river front, thence running along the river front of the shed he turned into another gangway and hastened toward the rear of the shed. In going through there he discovered Valle (the one of the four watchmen who was the regular employee of the railroad company) standing on top of the piled cotton, about 15 feet from the floor. Robeau joined Valle, who had the nozzle of a hose in his hand, from which no water was being thrown. From the place where the two stood on the piled cotton they saw a fire burning near the floor in the direction of the upper end of the shed. As they stood upon the pile of cotton they were above the hydrant pipe running up by the post, and about 6 feet above the platform around or upon the post, upon which was coiled the 100 feet of hose connected with the hydrant. From where they stood both the hydrant pipe and the platform with the coiled hose on it were hidden from their view by the piled cotton. Valle, holding the nozzle of the hose in his hand, from which no water was flowing, called upon Robeau to get down between the piles of cotton and open the water valve. Robeau squeezed himself through the space between the cotton piled around the post to the floor, felt about for the valve, perceived water on the floor, declared the valve to be open, and rejoined Valle. They both dragged at the hose, but no water flowed. The burning cotton flamed up, Valle called upon Robeau to get down on the platform around the post and uncoil or untangle the hose. He refused on account of the intensity of the fire, and both became alarmed and ran away. The destruction of the property ensued.

As the only witness who testified concerning the outbreak of the fire, the alarm, and the efforts to extinguish it, was Robeau, and as therefore his testimony is of the utmost importance in determining whether the case should have been allowed to go to the jury, we excerpt in the margin* the portions of his testimony which are material.

*Q. Now go on and state what occurred. A. After we had done telephoning, and saw everything was all right, we came to the office—I mean to the office of the shed No. 1—to take my lamp, and I went to my beat, and I met the one that was there, and I said “How is it?” He

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Such being the proof, was it sufficient to go to the jury? is the question then for decision. In answering this question, as we have said at the outset, we shall be called to pass upon, not the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves, not a decision as to the facts, but the determination of a proposition of law.

In *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543, 19 Sup. Ct. Rep. 296, the question of the liability of the gas company for certain acts of its general manager, in respect to procuring the publication of a libel, was presented for determination. In the course of the opinion, after observing that in the case no specific authority was pretended to have been given to the general manager on the subject, the court said, p. 545, L. Ed. p. 548, Sup. Ct. Rep. p. 300:

"We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to chose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide."

The court then reviewed the evidence on this branch of the case, and concluded as follows, p. 548, L. Ed. p. 549, Sup. Ct. Rep. p. 301:

"We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the sub-

told me "All right." I took off my coat and put my lamp away. Then I came to make my rounds as usual, to see if everything was right, where my key was. About five or six minutes I was standing there, or seven minutes; I can't tell exactly. I saw the private watchman pass. In about a minute or two I heard "Fire! Fire!"

By the Court:

Q. You heard the cry of fire? A. The crying of "Fire! Fire!" I run to the woods side to see if I could see anybody, but I could not see anybody, and then I run to the river side, and then I run to the fire and I passed through the shed to go to the woods side and I saw Valle with hose in his hand, and he says, "Go down and open the valve."

Q. What did you do? A. I went to open the valve. I could only go sideways. I couldn't hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn't do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn't do anything at all; and he says to me, "Robeau, go down and untangle the hose." I says, "I won't go down where the flame is." I kept up; that is the only thing I could do. I went to the other end of my beat, and took my coat and ran away.

Q. Where did you first see the light of the flame that night? A. I was about 70 feet from the light.

Q. When you saw Valle, did you first see the light of the flame? A. I saw Valle first.

Q. And when you first saw Valle, where was he? A. On top of the cotton.

Q. Whereabouts? About 12 or 15 feet high on top of the cotton.

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ject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it."

In *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275, the following facts appeared: The action was brought by Patton to recover damages for injuries sustained while in the employ of the railway company as a fireman. On a second trial a verdict was directed for the defendant, upon which judgment was rendered, and the court of appeals affirmed such judgment.

Answering the contention of the plaintiff in error that the trial court erred in directing a verdict and in failing to leave the question of negligence to the jury, the court said, p. 659, L. Ed. p. 363, Sup. Ct. Rep. p. 276:

"That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. Ed. 65, 66, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322; *Anderson County v. Beal*, 113 U. S. 227, 241, 28 L. Ed. 966, 971, 5 Sup. Ct. Rep. 433; *Schofield v.*

By the Court:

Q. Whereabouts on the wharf? A. At the woods side.

By Mr. Cleveland:

Q. You were on the woods side? A. Yes, sir.

Q. Where was Valle? A. He was on the cotton.

Q. Whereabouts, with relation to the center of the shed? A. The fire?

Q. No; where was Valle? A. He was about the center of the shed, but the upper end; because the fire was about 70 or 75 feet below the upper end.

Q. When you first saw Valle what was he doing? A. He had the hose in his hand.

Q. What was he doing with it? A. He couldn't do nothing. When I went down there he told me to go down and open the valve; and so I went, and it was wide open.

Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out? A. No, not a drop. We couldn't have any water.

Q. You did not see any water when you were opening the valve? A. Yes; saw the pouring.

Q. Leaking, you mean? A. Yes.

Q. When you clambered up with Valle, and he had the hose in his hand, what part of the hose did he have in his hand? A. The pipe.

Q. Was there any water coming out? A. No, sir.

Q. What was he doing when you got up on that pile of cotton? A. Tried to have water, but he could not have none.

Q. Was Valle on the hose? A. Yes, and I was too; but everything was in flames, we couldn't do nothing at all.

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Chicago, M. & St. P. R. Co., 114 U. S. 615, 618, 29 L. Ed. 224, 225, 5 Sup. Ct. Rep. 1125; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 472, 35 L. Ed. 213, 214, 11 Sup. Ct. Rep. 569. See also Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. Rep. 835; Elliott v. Chicago, M. & St. P. R. Co., 150 U. S. 245, 37 L. Ed. 1068, 14 Sup. Ct. Rep. 85.

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. Ed. 642, 13 Sup. Ct. Rep. 748."

We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so we shall, of course, be mindful, as was said in Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275, that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.

All the reasonable tendencies of the proof, if any, to show

Q. You say he said to you, "Go down and untangle that hose?" A. Yes, sir.

Q. How do you mean to go down? Where was the hose? A. The hose was pretty near where the fire was, against the post.

Q. Against the post? A. Yes, sir.

Q. Was it on the platform? A. On the floor.

Q. On the floor of the platform? A. Yes.

Q. On the posts? How high up from the floor of the dock? A. The hose?

Q. Yes. A. The hose was about 6 feet high.

Q. What did you do when you got up with Valle? A. Tried to pull out the hose to have the water to extinguish the fire, but we could not. Everything was in flames.

Q. When did you first see the flames that night? Before you got up to Valle? A. When I got on top I saw the flames.

Q. How many bales of cotton were on fire then, as you recollect it? A. About 3 or 4 bales.

Q. No water came out of the hose? A. No, sir.

Q. How long were you there pulling that hose, trying to untangle it? A. Maybe two or three seconds, because we tried the best we could.

Q. Describe to the jury this fire? Where was it? Was it on the top of the cotton or at the bottom? A. At the bottom of the floor.

Q. How near did you come to the flames that night, when you were nearest to them? A. About 15 paces.

Q. In your judgment, if you had had a sufficient stream of water— A. We could easy put it out.

Q. Wait. In your judgment, if the water had come out of the hose

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negligence, must arise from three propositions, which we shall proceed to consider in their order.

First. The manner in which the cotton was stored and the operation of the locomotives in and about the same so as to subject the cotton to danger of fire and to cause the prompt detection of a fire to be so difficult as to render it practically impossible in time to prevent a conflagration.

That the storage of such a great mass of cotton in the open sheds and on the wharf, with only a few narrow gangways from front to rear, with no passageways between the tiers running lengthwise of the sheds, so as to enable the cotton to be inspected and to be accessible upon an alarm of fire, with substantially no tarpaulins or other covering, and the operation of the locomotives in and around the open sheds and in front of the wharf among the cotton so situated, at least afforded sufficient proof to go to the jury, we think is too clear for discussion. This was not controverted by either the trial court or the circuit court of appeals, but the proposition which those courts felt constrained to uphold was that, as the proof did not in their opinion furnish any reasonable ground from which it could be inferred that the acts above enumerated had actually tended to produce the fire, therefore, even although there was negligence in the matters suggested, they furnished no reasonable ground upon which the jury could have given a verdict for the plaintiffs. This reasoning proceeded upon three assumptions, (a) because the proof did not show that the locomotive operating along the front of the wharf, on the morning of the 12th of November, had traversed

that night—a full stream of water—such as the hose was able to carry, could you have extinguished the flames? A. Yes, sir; myself alone.

Cross-examination by Mr. Taggart:

Q. Where were you on the wharf when you first heard this cry of fire? A. I was about 30 feet under the shed, at the lower end.

Q. Towards No. 1 shed? A. Yes.

Q. On the river side? A. On the river side.

Q. That is out near the tug that was there? A. About 30 or 40 feet. I can't say exactly.

Q. Were you under the shed? A. Under the shed.

Q. Which way did you go when you heard the cry of fire? A. My idea first was to go to the woods side to see if I could see anybody.

Q. Were you at a gangway? A. Yes, sir.

Q. You went through that gangway then to the woods side? A. Yes, sir.

Q. And you saw nothing? A. I saw nothing. Then I run to the river side.

Q. Did you come back through the same gangway? A. No, sir.

Q. You went up along the woods then? A. I went to the upper end of my beat after I heard the noise "Fire! Fire!"

Q. Did you go clear up to the upper end? A. Yes, sir.

Q. And you did not see any fire up there? A. No.

Q. Then where did you go? A. I went to the woods again. I went through the gangway, and I saw Valle.

Q. This hose he had in his hand, you say, did you? A. He had what?

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the track opposite to or in the immediate vicinity of the place in No. 2 shed where the fire occurred; (b) because there was no proof that the locomotive was emitting sparks or dropping fire from its firebox, and if there had been, because the proof as to the direction of the wind showed that such sparks, if emitted, would have been blown away from the direction of the upper part of No. 2 shed where the fire broke out; and (c) because the fire was immediately discovered on its outbreak.

But each of these propositions either rested on premises of fact where no proof whatever existed, or disregarded what the jury would have had the right to conclude was the reasonable tendency of the proof as made. There was no question that the proof showed, leaving aside the movement of the engine on the wharf on the morning of the 12th of November, that other locomotives had been moving in the rear of the wharf and in its vicinity probably on the night of the 11th, and certainly on the 10th, and previously; and the proof also unquestionably showed that for days prior to the breaking out of the fire, except it may be Sunday, vessels had been loading at the wharf in front of the No. 2 shed, and the tendency of the proof was to show that the cargo which they took was carried on the wharf in front of the shed by locomotives. To hold, then, that there was no proof tending to show that the conflagration was the result of the movement of locomotives about and among the piles of exposed cotton, was simply to say such must have been the case because the proof did not tend to show that the fire could have been caused by the locomotive which was on the wharf on the morning of the 12th. This,

Q. He had the hose pipe in his hand, did he? A. Yes, he had the pipe in his hand.

Q. How far was the hydrant from where he was? A. About 10 feet; but where he was he could not see the hydrant.

Q. He could not see the hydrant? A. He was on top of the cotton. He could not see me when I went down neither.

Q. What did you do when you went there? A. I went there and I saw the valve was wide open.

Q. The what? A. The valve of the pipe.

Q. And was there water in the hose? A. Kind of water; yes, in the hose.

Q. It had pushed out in the hose, had it? A. Yes, swelled up.

Q. How far had it pushed out and swelled up in the hose? A. I didn't look. As soon as I saw it open I went to Valle to help him.

Q. What did you do to help him? A. We tried to pull the hose free, and we couldn't do anything.

Q. The pressure of water had kinked the hose? A. Yes, the hose was so tangled that we couldn't do anything. At the same time the blaze was going; and Valle says to me, "Go down and have it untangled." And I said, "No, I won't go, go yourself if you want to."

Q. And you run away then, did you? A. Yes, I did. I tried to save my skin.

Q. This cotton was blazing? A. Yes, very high.

Q. Blazing right up? A. Yes.

Q. Blazing way up? A. Yes.

Q. How high was it blazing when you got there? A. About 6 feet from the floor—about.

Q. How high was the pile of cotton? A. The cotton was piled about 15 feet high.

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however, was only to find, in the absence of all proof as to any other origin of the fire, that it would have been unreasonable for the jury to deduce the conclusion that the fire was the result of other and previous proximity of the locomotives to the cotton. The obvious danger resulting from the use of the locomotives, as described, in and about so easily ignitable a material as cotton, particularly when stored and unprotected as this was, is to our mind so clear that we think the least that can be said is, when the origin of the fire was otherwise unexplained, that the jury would have been reasonably justified in drawing the inference that the use of the locomotives caused the fire. And the general course of legislation, both in England and this country, demonstrates the soundness of this conclusion. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611, 17 Sup. Ct. Rep. 243. The only possible ground by which this can be met is the assumption that because there was no proof tending to show the operation of a locomotive in the rear of the sheds or on the front of No. 2 shed, for a considerable period of time before the fire, therefore sparks from the locomotives could not have caused the fire, because if they had the conflagration would have broken out sooner. But this assumes that compressed cotton, piled up as this was, if ignited by sparks, would necessarily at once break out into flame, and disregards the right to have the judgment of the jury as to whether the fiber of such cotton, when so situated, on being touched by a spark, might not have smouldered for a considerable time, until such headway had been gained as to cause the fire to break into flame. In

Q. Was it blazing along the side of that pile of cotton? A. Yes, spread out.

Q. Spread out along the ends of the bales, was it? A. Yes.

Q. Where was this kink in the hose—down below Valle? A. Where the platform was?

Q. Yes. A. About 6 feet under.

Q. You say the valve, when you tried it, was wide open? A. Yes, sir.

Q. How far out in this hose had the water pushed out from the pipe? A. I don't know that.

Q. Did you take hold of the hose to see? A. With all my might, all the strength I had.

Q. And the pressure of water was so heavy that you could not straighten it out? A. We couldn't budge it.

Q. Do you know who opened that valve? A. I don't know.

Q. Do you know how high the fire was when that valve was opened? A. Yes.

Q. How high was it when the valve was opened—when it was first opened?

The Court: He found it open.

The Witness: I found it open when I got there.

Q. You don't know who opened it? A. No, I don't know who opened it.

Q. How long were you there with Valle when you discovered this fire?

A. I never took my watch for that. I did the best I could.

Q. About how long were you there? A. Maybe two or three seconds; I don't know.

Q. And then where did you go? A. I went up stairs to help him.

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other words, there being two inferences to be drawn from the testimony, one of a sudden outbreak of the fire and the other of a long-continued smouldering, it was the province of the jury to pass upon the question. And this disposes of the assumption that the fire was discovered immediately on its breaking out. Such assumption, however, was a mere unreasonable inference from the facts in favor of the defendant and against the plaintiff, and rested on the predicate that there was nothing in the proof which would have justified a jury, although the cotton was compressed and piled up, in inferring that the fire might have smouldered for a considerable time before bursting into flame. It was certainly open to the plaintiff to direct the attention of the jury to the obvious natural law that any fibrous material, like cotton, when tightly compressed and piled, as was the cotton in question, if ignited by a spark, may smoulder for an uncertain period. The only proof on the subject of the discovery of the fire is that to which we have referred, giving an account of the alarm of fire by Valle. The mere fact, however, that he gave an alarm of fire when he discovered it does not support the inference that the fire had not been burning for a considerable period before he knew of it. Indeed, when the state of the fire, as described by the witness Robeau when he first saw it, is taken into consideration, and the natural tendency of a tightly compressed fiber to smoulder is borne in mind, the jury might have reasonably inferred, we think, from the condition of the fire when first seen by Robeau and the rapid and extensive conflagration which almost immediately resulted, that the

Q. You went up on the cotton? A. On the cotton.

Q. How long were you there with him? A. Maybe one or two seconds.

Q. Then where did you go? A. I said I tried to save myself.

Q. In saving yourself, where did you go? A. I went to the lower end of my beat and took my overcoat and ran away. I didn't stay any more.

Q. No, how long was it before the fire was spread all over the No. 2 shed? A. About ten minutes.

Q. And about two seconds after you got there you had to run away on account of the fire, didn't you? A. Yes.

Q. Do you know where the fire started? A. Right in the center of the shed; I mean up the shed, about 40 or 50 feet this side.

Q. About 40 or 50 feet south of the upper end of No. 2 shed? A. I can't say exactly. About 70 feet, maybe. I don't know.

Q. About that far from the upper end of No. 2 shed? A. Yes, sir.

Q. And in the center of the shed, wasn't it? A. Yes, sir.

Q. And near the bottom of a pile of cotton, wasn't it? A. What?

Q. Was it near the bottom of the pile that it was burning? A. At the floor, I told you where it started.

Q. Was there a whole pile of cotton on fire? A. When I got there I saw the light of the fire.

Q. Where did you see the light from? Where were you when you saw the light of the fire? A. Didn't I tell you that?

Q. No, you have not. A. Didn't I tell you I was about 70 feet from the light of the fire?

Q. Was it in a gangway that the fire was? A. Yes, sir.

Q. Were you at the end of the gangway when you saw the light? A. I was on the platform outside.

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discovery marked, not the time when the ignition of the cotton took place, but the breaking out of the cotton into a flame as a consequence of its prior burning. This also disposes of the view that, although the cotton was negligently stored by leaving no gangways through the length of it, by which it could be inspected and the presence of fire be promptly detected, the proof did not tend to justify a recovery because the fire was discovered in the mass of cotton just as soon as it would have been if proper precautions had been taken in its storage. The description of the state, of the fire, we think, afforded ground for a jury to otherwise find, for the only proof on the subject was that, in order to discover the fire, the watchmen had to climb up on the pile of cotton, and that it was not possible, from the gangway, to have seen the fire, as it would have been if suitable openings lengthwise had been left.

Second. That the proof showed negligence in the care of the property inasmuch as the number of watchmen who were engaged were greatly inadequate for the service, and therefore the jury would have been reasonably justified in finding that the destruction of the cotton was occasioned thereby.

Here, also, we think it was evident that the presence of only four watchmen to care for so vast an accumulation of cotton stored and exposed to the risks it was subjected to was sufficient to go to the jury on the question of negligence. Both the courts below with reference to this ground substantially concluded, as they did as to the former one, that even although the number of watchmen was insufficient, nevertheless as the inadequate number of watchmen discovered the fire as soon

Q. And did you see the light down the gangway? A. Yes, sir.

Q. How much of a fire was there then, when you saw that? A. I couldn't tell you.

Q. You did not see the fire? A. Yes; when I came to climb up on the cotton, Valle says to me: "Go down and open the valve."

Q. I didn't ask that. I asked how much of a fire there was? A. I don't know.

Q. You did not see the fire? A. I saw the light of the fire.

Q. How much light was there: was it a big light? A. How much light was there?

Q. Yes; how much light did you see? A. I can't say exactly how much light I saw.

Q. Did you see it over the piles of cotton? A. No, sir; we couldn't see it.

Q. You could not see it over the piles of cotton? A. Because I passed there, about 15 paces from the places in the gangway.

Q. When? A. To come to Valle.

Q. And you did not see it in the other gangway, then, did you? A. No, of course not.

Q. You say this blaze was about 6 feet high when you got there? A. 6 or 7 feet high, yes.

Q. And how many bales of cotton was it covering? A. I don't know. I saw the light of the fire.

Q. I know, but when you got there?

The Court: When you got there to Valle? A. Three or four bales.

Q. Had it burned the covering off the bales? A. They were spread out.

Q. How wide was the fire; how wide was the blaze? A. About 15 or 20 feet I should say.

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as it broke out, a greater number of watchmen could have done no more, therefore the inference of negligence contributing to the loss was, as a matter of law, unwarranted. This, however, but rested on the assumption that the fire was immediately discovered. On the contrary, as we have said, not only the reasonable inference that cotton stored and piled like that here in question, when ignited, would smoulder, but the actual facts as to the conflagration in hand, we think, were sufficient to go to the jury so as to enable the jury to conclude whether, if an adequate force of watchmen had been on hand, the fire might have been sooner detected and the property saved from destruction. But the larger number of watchmen would have been efficient, not only in detecting the fire, but for the purpose, in such an emergency, of handling the cotton in order that the fire might be gotten at and extinguished. That an adequate force might have so done was reasonable to infer, especially in view of the proof that in the daylight, when a larger body of men were at work, smouldering cotton was discovered in one of the lower bales, and by removing the others and getting at the ignited bale in a tier, a conflagration was prevented.

Third. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus and from the want of instructions as to its use or competent men to handle it.

This proposition, we think, is also well founded. The argument to the contrary is that, as it was shown that if the apparatus which was there had been properly worked, the fire would have been extinguished, therefore there was no negligence in respect to such appliances. The proof was construed to be that when Robeau heard the alarm of fire and rushed to the point where Valle stood, upon the cotton, and was ordered by Valle to go down and open the valve, he found the valve open, because Valle had previously opened it. But we have searched the record in vain for any direct proof that Valle had opened the valve before Robeau's arrival. Non constat, therefore, that the valve had not been left open negligently some time previously, as it was hid from view by the cotton, and if the open valve therefore caused the tangling of the hose or rendered it so that it could not be moved, the negligence in respect to the care of the hose would be that of the company. If it be that one inference from the testimony would have justified the conclusion that Valle had opened the valve, as such inference

Q. Was it on the end of a solid bale of cotton? Was the pile of cotton solid there that it was burning against? Do you understand that? A. What do you mean?

Q. Was this cotton piled? A. Yes, like that.

Q. And was it burning 15 feet high? A. Yes, spreading.

Q. Spreading rapidly? A. Yes.

Q. How long was it from the time you heard Valle cry "fire" until you got to Valle? A. Maybe half a minute. I don't believe it was.

was not necessarily to be drawn, then it was the function of the jury, and not of the court, to draw the proper inference.

But this, it is argued, is of no consequence since, it is asserted, the proof showed that the cause of the destruction of the cotton was not the imperfect nature of the appliances, but an error of judgment in the use of them by the employees in the emergency of the moment. The proof, it is insisted, left no room for any other inference than that Valle on the discovery of the fire had rushed to the spot, thrown the hose down from the platform, got down among the cotton and opened the valve, or had left the hose on the platform without unwinding it, and that the pressure of water had either so kinked or tangled the hose when thrown down, or rendered it so difficult to move it, if left coiled on the platform, that the water would not flow, and the failure to extinguish the fire resulted. But all the elements contained in these propositions involve mere inferences from the evidence which it was the province of the jury to make. The only testimony in the case showing the actual condition of the hose at the time of the discovery of the fire was that of Robeau. That testimony showed that the cotton was piled up around the post where the hydrant was situated, above the platform on which the hose was coiled, to such an extent that neither the hydrant nor the hose could be seen from the gangway or from the top of the pile of cotton, that to get at the hose, if it was on the platform, required either reaching to or getting on the platform about 6 feet below, between the cotton, and to reach the valve necessitated squeezing down between the cotton to the floor. Under these circumstances and the difficulties which they necessarily created, we think the proof was such as would have reasonably justified the jury in concluding that the negligent acts of stowing the cotton high up around the hose and the hydrant and the valve connected with it created a condition so conducing to error of judgment and misdirected efforts as to render the railway company responsible therefor. And this conclusion is greatly fortified when the uncontradicted proof is considered that no general rules for the use of the first apparatus had ever been promulgated, that no systematic inspection thereof had been made, that no fire drill or instructions as to the use of the apparatus was had or given, and that the too few watchmen were left in case of an emergency to use an apparatus which, even if it were intrinsically adequate, was surrounded by the act of the company with such conditions that its favorable and efficient use was rendered practically impossible.

This leaves for consideration only the question whether the case should have been allowed to go to the jury on the question of deviation. As the result of the conclusions to which we have come on the question of negligence is that a new trial must be granted, it follows that on the new trial the whole case will be open. Being so open, we cannot say that

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testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us. Conducive, however, to the result that there may be an end to this litigation, we content ourselves on this branch of the case at this time with saying that we think the proof in this record fully justified the action of the trial court in respect to the question of deviation.

The judgments must be reversed and the cause remanded to the Circuit Court of the United States for the Southern District of New York with directions to set aside the verdict and grant a new trial, and it is so ordered.

SOUTHERN RY. CO. v. ATLANTA NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit, January 7, 1902.)

[112 Fed. Rep. 861.]

Bailment—Stoppage of Cotton in Transit for Compression—Relation and Liability of Compress Company.

Under rules governing the transportation of cotton by southern railroads which permit it, when shipped from interior points to the seaboard on through bills of lading, to be stopped in transit for compression, the owner of a compress through which cotton is so billed for compression and substitution, who receives it accompanied by manifests which are substantial copies of the bills of lading, and show that they require its delivery at the end of the shipment, to "order notify," takes and holds it subject to their terms, and is liable to the holder thereof for a delivery of the cotton without their production to one not authorized to receive it, by which it is lost to such holder.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

This was an action by the Atlanta National Bank, the defendant in error, against the Southern Railway Company, the plaintiff in error, to recover an amount claimed as damages for the wrong delivery of certain bales of cotton. Paragraphs 1 and 2 of the petition described the parties. Paragraph 3 alleged "that the Southern Railway Company has injured and damaged petitioner in the sum of \$12,952.37, besides interest, as hereinafter stated." Paragraphs 4, 5, and 6 described the cotton, and whence it started. Paragraph 7 alleged that for each and all of the lots of cotton the receiving carrier issued to the shipper a bill of lading providing for its safe carriage and its delivery to Hamilton, Gibson & Leake, or order, at Norfolk, Va. Paragraph 8 averred that the Southern Railway Company was one of the lines over which the several lots of cotton were to be transported, and all of the cotton receipted for by the Atlanta, Knoxville & Northern Railway and the Nashville, Chattanooga & St. Louis Railway was by said roads transferred and delivered to said Southern Railway Company at Atlanta, Ga. Paragraph 9: "All of said cotton was shipped care of Bell Street Compress, which was run and controlled by the Southern Railway Company

when the cotton was receipted by it." Paragraph 10: "Your petitioner bona fide and in due course of business received the bills of lading as collateral security for the payment of a certain note, and it was on the faith and credit of said bills of lading that said money was advanced, and by reason of said indorsement petitioner became invested with title to said bills of lading and the property covered thereby." Paragraph 11: "Each and all of said bills of lading were indorsed at the time of said transfer by the proper persons to vest full title in petitioner." Paragraph 12: "That defendant, by accepting said cotton, is bound by the terms of said bills of lading, and contracted thereby to safely deliver said cotton to the order of the consignees." Paragraph 13 averred that the petitioner attached to its petition copies of all of said bills of lading, with the indorsements thereon. Paragraph 14 charged that the defendant wrongfully delivered said cotton at Atlanta, Ga., to Hamilton, Gibson & Leake, without the knowledge or consent of the petitioner, and without the production of said bills of lading, and thereby injured the petitioner in the sum sought to be recovered in this action, namely, \$12,952.37, besides interest from April 1, 1898, and all accruing interest at 8 per cent. until paid, being the balance due on said debt; the value of said cotton exceeding the balance due on said debt at the time of said wrongful delivery. Paragraph 15 shows the suing out of an attachment executed by process of garnishment on the Fourth National Bank and the Capital City Bank of Atlanta, the garnishees having made answer unto said process admitting an indebtedness sufficient to satisfy petitioner's demand, closing with a prayer for judgment on its attachment against the defendant company and against the garnishees for the amount of its demand, principal and interest, according to the statute in such cases.

The defendant interposed a general demurrer that the petition showed no cause of action, and demurred specially to paragraph 14 on the ground that there was no such ownership in the plaintiff, as transferee of the bills of lading, as would cause privity to exist between it and the defendant, not a party to the contracts of shipment represented by the said bills of lading; with a motion to strike all allegations above demurred to. The defendant also presented its plea and answer to the different paragraphs of the plaintiff's petition.

By consent of parties, the cause was referred to an auditor "to hear and determine all questions of law and fact therein, and report the evidence and his conclusions to the court, subject to further consideration and revision."

(Part of auditor's report omitted.)

"On the question of handling cotton at the compress in the city of Atlanta there was introduced these two rules adopted by the Southern Railway & Steamship Association, which was composed of the railroads centering in Atlanta:

"Rule 3. Through shipments of cotton covered by through

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bills of lading and waybills may be stopped in transit for compression, or for compression and substitution, and afterwards reshipped on the basis of a through rate from original point of shipment to final destination, provided the cotton is not held at the compress point for more than sixty days.

“‘Rule 4. The destination of such cotton may be changed after reaching the compress point upon surrender of the original bills of lading, and new bills of lading may be issued to correspond to changed destination, and through rate from initial point of shipment to final destination at the time of shipment to be strictly maintained.’

“‘The material facts which the court finds in this case, and which it considers controlling, are that all of the cotton in question was shipped, as shown by the bills of lading, via Bell Street Compress, Atlanta, and that the manifests which accompanied the cotton in question into the compress showed that it was shipped to ‘order notify,’ which by the custom among railroads indicated to any one familiar with such matters that the bills of lading were outstanding in the hands of others than the shippers or consignee, and the further fact that the cotton was unquestionably allowed to go out of the compress without the production of the bills of lading.

“Conclusions of Law.

“(1) The defendant is not liable to the plaintiff so far as the transfer of the cotton from the Western & Atlantic Railroad depot to the compress is concerned. Its duty in this respect was simply to track the cotton from the Western & Atlantic Railroad depot to the compress, and there deliver it; and this duty it performed. There cannot be, in any view of the case, a liability against the defendant on account of this service.

“(2) There is no liability on the part of the defendant company to the plaintiff either as a connecting or a common carrier. Any duty the defendant owed the plaintiff as to the transfer of this cotton was discharged. As an outgoing carrier it assumed no duty, the evidence all showing that the cotton could have been routed out by any road entering Atlanta.

“(3) The defendant is liable to the plaintiff as a compress company. The reasons for this last conclusion are fully given in the opinion filed on January 23, 1901, on the hearing of exceptions to the report of the auditor, to whom this case was referred.

“The court is of opinion, therefore, that the plaintiff is entitled to recover of the defendant, and it is ordered that the plaintiff do recover of the defendant, the sum of twelve thousand nine hundred and fifty-two dollars and thirty-seven cents (\$12,952.37) principal, with interest thereon at the rate of eight per cent. per annum from April 1, 1898, and costs of court.

“Wm. T. Newman, U. S. Judge.

“This March 27, 1901.”

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On March 30, 1901, the circuit court rendered its judgment that the plaintiff recover of the Southern Railway Company the sum of \$12,952.37 principal, together with the sum of \$3,105.33 interest up to that date, and together with all accruing interest on said principal at 7 per cent. per annum until paid; to which finding and judgment of the court the Southern Railway Company excepted, and to reverse which sued out this writ of error.

P. H. Brewster and Saunders McDaniel, for plaintiff in error.

B. F. Abbott, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

(After deciding a question of jurisdiction.)

There are two questions of law in this case: (1) Are the pleadings of the plaintiff sufficient to support the judgment? (2) Do the facts found by the trial judge support the judgment?

(Question of pleading omitted.)

Are the facts found sufficient to support the judgment? We are embarrassed by the state of the record in our effort to hold in view or set out with clearness the facts found by the trial judge. On the same day that he approved the writ of error bond (May 25, 1901) he caused to be entered in the case an order "that the opinions rendered by the court in the above-stated cause be, and the same are hereby, made a part of the record in said cause." And on the bill of exceptions that day presented by the railway company, he indorsed: "I do certify that the foregoing bill of exceptions is true, and, together with the record and opinion of the court, contains all the evidence, rulings, and decisions of the court material to a clear understanding of the errors complained of; and the clerk of said court is hereby ordered to file the same as a part of the record of said cause." It cannot be that the many pages of record matter to which this certificate refers are to be received and considered by us as the special findings of fact, and it may well be doubted if, under the conditions in which the case was tried in the circuit court, it is our duty to thresh through all this matter and winnow out the special findings which it may contain. If so, it is very difficult to distinguish between a review of such a judgment on writ of error and a review on appeal of a decree passed in equity.

Waiving any question on this subject, it sufficiently appears that the trial judge did find: That the plaintiff bank had taken a note from Hamilton, Gibson & Leake for \$30,000, due on demand; had advanced them money from time to time, and paid their checks, which were secured from time to time by bills of lading covering shipments of cotton shipped to Atlanta

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and shipped out of Atlanta. That the plaintiff bank was the bona fide holder, for value, of the bills of lading (attached to the plaintiff's petition) at the time the suit was filed in the city court by it. That these bills of lading were received by it within a few days after they were issued, and, whether in its possession at the time the cotton was delivered to the Bell Street Compress or not, they had gotten into its possession before the cotton finally left the Bell Street Compress. That all of these bills of lading recited in the usual form the receipt of cotton from the shippers, and provided that the cotton was to be shipped to Norfolk, Va., and delivered to "order notify" Hamilton, Gibson & Leake, via Bell Street Compress, Atlanta, Ga. That the Bell Street Compress, at the time this cotton reached it, was owned, controlled, and operated by the Southern Railway Company, not as a separate corporation, but simply as its property; the railway company receiving the net profits arising from the business. That all of the cotton covered by the bills of lading was brought to Atlanta by other carriers, and all the cars taking the cotton in controversy were delivered at Atlanta to the Southern Railway Company, and receipted for by it, and hauled or tracked by it to the Bell Street Compress, and there delivered to the agents or servants of the Southern Railway Company then in charge of the custody and operation of the compress, accompanied by manifests of the freight waybills, substantial copies of the waybills, which, in turn, were substantial copies of the bills of lading, in each of which manifests the cotton was described, its destination, Norfolk, Va., was given, and the consignee, "order notify" Hamilton, Gibson & Leake, was set out. The charges on the cotton were not set out in these manifests. That when these cars reached the compress the agents and servants of the railway in charge of the compress opened the cars, and placed the cotton in a certain space or compartment within the compress set apart to Hamilton, Gibson & Leake, the purpose of which was for classification and substitution by Hamilton, Gibson & Leake, who would then notify the persons in charge of the compress that they wished a certain number of bales of cotton compressed, which was to be sent to a certain point designated in the notification; and in this way the destination of the cotton was changed between the time it reached the compress and the time it was taken out of the compartment.

On the question of handling cotton at the compress two rules adopted by the Southern Railway & Steamship Association, which was composed of the railroads centering in Atlanta, are as follows:

"Rule 3. Through shipments of cotton covered by through bills of lading and waybills may be stopped in transit for compression or for compression and substitution, and afterwards reshipped on the basis of a through rate from original point of shipment to final destination, provided the cotton is not held at the compress point for more than sixty days.

“Rule 4. The destination of such cotton may be changed after reaching the compress point upon surrender of the original bills of lading, and new bills of lading may be issued to correspond to changed destination; the through rate from initial point of shipment to final destination at the time of shipment to be strictly maintained.”

The cotton, after being compressed, was by the agents of the defendant railway in charge of the compress delivered by loading sheets to Hamilton, Gibson & Leake, and again shipped; but where to does not clearly appear in the evidence, but the fair inference from the evidence is that the destination of said cotton was by Hamilton, Gibson & Leake changed at the compress. This delivery of the cotton to Hamilton, Gibson & Leake by the agents of the defendant in charge of the compress was without the knowledge of the plaintiff, and without requiring the production of the outstanding bills of lading covering the cotton. The value of the cotton thus delivered to Hamilton, Gibson & Leake is more than the amount of the plaintiff's debt. The trial judge concludes his findings of fact thus:

“The material facts which the court finds in this case, and which it considers controlling, are that all of the cotton in question was shipped, as shown by the bills of lading, via Bell Street Compress, Atlanta, and that the manifests which accompanied the cotton in question into the compress showed that it was shipped to ‘order notify,’ which by the custom among railroads indicated to any one familiar with such matters that the bills of lading were outstanding in the hands of others than the shippers or consignee, and the further fact that the cotton was unquestionably allowed to go out of the compress without the production of the bills of lading.”

We quote the following language from a decision of the supreme court:

“In ordering judgment for the plaintiff, certain propositions of law are announced by the judge as having been held by him. These are important only as they necessarily and of themselves affect the question whether the facts found are sufficient to support the judgment, and they are no more important than if they had not been thus announced. No specific exception * * * can be taken to them.” *Jennison v. Leonard*, *supra*.

The great contention in this case appears to have been over the question whether the railway company, if liable at all, is liable as a carrier or as a warehouseman. It is clear to us from the findings of fact as we have digested them that this question is purely speculative, and its treatment shows a straining after definitions and an indulging in an interesting play on words rather than giving a just consideration to the things actually done and the obligations and liabilities thereby incurred. The Bell Street Compress is a place by which or through which produce may be billed to be carried, and at or

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in which it may be deposited; but as a physical plant it has no capacity to appoint or have an agent, or to receive or deliver goods that have been carried or are to be carried to or from that place. It is not a person, natural or artificial, that did assume, or could assume, obligations, or incur liabilities. The natural persons in charge of its custody and operation were the agents and servants of the defendant railway,—an artificial person, that was sole owner of the compress plant and sole operator thereof, for its own profit, by and through agents and servants of its own appointing, and by and through whom it could and did assume obligations and incur liabilities; and it seems to us wholly immaterial to the disposition of this case to vex ourselves with the question as to whether the obligations it assumed and the liabilities it incurred were as a carrier or as a warehouseman. There is nothing in the defense that addresses itself, or can address itself, to such a distinction (as, for instance, a plea of limitation or of set-off). The property which the plaintiff owned as security for its debt having been wrongfully delivered to parties not entitled to receive it, and without the consent of the plaintiff, who alone had the right to receive it, the circuit court rightly adjudged that the plaintiff should recover from the defendant the amount of the damage the plaintiff had thereby sustained, which was the amount of its debt, principal and interest at the contract rate up to the date of the judgment, with lawful interest thereafter on the amount of the principal.

The judgment of the circuit court is affirmed.

TAFFE v. OREGON R. CO.

(Supreme Court of Oregon, March 10, 1902.)

[67 Pac. Rep. 1015.]

Carriers of Goods—Contract of Shipment—Construction—Connecting Carrier—Liability for Loss.*

A contract of shipment of goods consigned to New York was made upon the carrier's printed form of bill of lading, containing a blank space for the place of destination, with directions not to insert points not on the carrier's lines. The blank was not filled. The written part of the contract provided for "fastest passenger train service, consigned as above." A stipulation relieved the carrier from liability for loss or injury to the property, except on its own lines: *held*, that the blank space for the destination of the goods was reserved for points on carrier's own lines, and that the written part of the contract was a contract for general carriage, containing the designation of the place of shipment, subject to the stipulation as to liability, and therefore the carrier was not liable for losses on lines of connecting carriers.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Jr., Judge.

Action by I. H. Taffe against the Oregon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

*As to the proper construction of contracts of shipment, see 9 Cent. Dig., col. 131 et seq.; 2 Rap. & Mack's Dig. 156 et seq.

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On September 17, 1898, the plaintiff shipped at Celilo station, in Oregon, by defendant's railroad, one car load of fresh salmon, consigned to Chesebro Bros., Fulton Market, New York City. The bill of lading, signed by the shipper and the defendant's agent, so far as it is necessary to set the same forth for an intelligent understanding of the controversy, is as follows:

"Celilo, Sept. 17th, 1898.

"Received of I. H. Taffe the following described freight, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to

(Do not insert point not on the line of this system.)

and delivered in like good order to the consignee at said station, wharf, or landing (or, if said freight is to be forwarded beyond the lines of this company, to such company or carriers whose line may be considered a part of the route to the place of destination), on payment of freight charges, together with such charges as shall have been advanced on the same.

"This contract, and the responsibilities of the parties thereto, is limited and controlled by the conditions printed on the back hereof, as also by the terms and conditions of this company's printed tariffs, which are hereby declared to be an essential part of this contract.

"Original [Signed] By E. B. Coman, Condr., Agent.

"I. H. Taffe, Shipper.

CONSIGNEE, MARKS, AND DESTINATION.

Chesebro Bros., Fulton Market, New York City.

No. Packages.	Articles.	Weight. Subject to cor- rection.
	One F. G. E., car No. 14,685. Fresh salmon, about 9½ tons, on fastest passenger train service, consigned as above.	

Charges Adv., \$——.

"The company will not be responsible or liable for any loss, damage, or injury to property, except upon its own lines, and will not be responsible for any loss, damage, or injury to property after the same shall have been tendered to any connecting carrier or freight man for further transportation."

Loss having occurred by reason of delay in transportation and a decline in the New York market, this action was instituted to recover damages therefor based upon the bill of lading. The defendant, for a separate defense, alleges, in effect, that it is the owner of a line of railroad extending from Portland to Huntington, at which point it connects with the Oregon Short Line, extending to Granger, where the latter line connects with the Union Pacific Railway, extending to Council Bluffs, at which point other connecting lines extend

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to Chicago, and from there other lines extend to New York City; that defendant did not own, or have any interest in the operation of, any of said lines of railway east of Huntington, all of which plaintiff well knew, and that the contract mentioned in the complaint, and by the answer fully set up, was entered into with full knowledge of said matters; that on the 17th day of September, 1898, at Celilo, Or., the plaintiff tendered to E. B. Comant, the conductor on the fastest east-bound passenger train, the car of salmon in question; that when so tendered the plaintiff and said conductor signed the bill of lading, and that plaintiff and defendant entered into no other contract relating to the transportation, other than evidenced thereby; that the defendant carried said car to Huntington by said fastest passenger train without delay, and there delivered the same, as a part of said train, to the Oregon Short Line Railroad Company, to be forwarded through like trains to destination; that said car was immediately transported by said fastest passenger train on its journey to Granger by the Oregon Short Line Railroad Company, without delay; that from thence said car was so transported to Chicago, and that the delay complained of occurred after the same had reached Chicago, without fault or negligence on the part of the defendant, but solely as a result of the negligence and fault of the carriers operating east of Chicago, in failing to transport said car by fastest train service on said roads, and not otherwise. A demurrer interposed to this defense was sustained, and the case went to trial on the stipulation of the parties, whereby it was agreed that the bill of lading constituted the sole agreement between the parties for the transportation; that defendant owns and operates a line of railroad extending from Portland, through Celilo, eastward to Huntington, where it connects with the Oregon Short Line, from whence other connections are made with railroads extending to Council Bluffs, thence to Chicago, and from thence to New York City; that the car was transported by the defendant on the fastest passenger train service to Huntington, and there delivered, as a part of the train, to the Oregon Short Line Railroad Company, to be forwarded by said train and through like trains to New York City; that said car was transported to Chicago on like fastest passenger trains without delay, but at some point east of that place it was, in violation of the instructions of the defendant to the Oregon Short Line Railroad Company, dropped from said fastest passenger train service, and was thereby delayed. An objection interposed by plaintiff to the introduction of the latter clause of the stipulation in evidence being sustained, and no other evidence being offered, the court instructed the jury to return a verdict for the plaintiff; and, judgment having been entered upon the verdict so returned, the defendant appeals.

W. W. Cotton, for appellant.

Rufus Mallory, for respondent.

WOLVERTON, J. (after stating the facts). Two errors are assigned; one relating to the court's action in sustaining the demurrer to the separate defense, and the other in rejecting, as immaterial and irrelevant, the latter clause of said stipulation, both of which present but a single question; that is, whether the contract or agreement relied upon by plaintiff, and which is admitted by both parties to be the only one entered into with reference to the transportation of the car of salmon, is an undertaking on the part of the defendant to carry it to Huntington only, and deliver it to its connecting line, or to carry it through to Fulton Market, New York City. The contract, like others, must be construed by looking through the whole instrument, and in the light of the circumstances attending the transaction and its execution by the parties concerned. The law applicable to the simple receipt or acceptance of goods by common carriers, directed or consigned beyond the line of the carrier, by the conceded weight of American authority, requires them to be transported to the terminus of its lines, and there delivered to a connecting carrier to be forwarded to their destination, and with this the responsibility ceases. This is the doctrine of the supreme court of the United States and a large majority of the state courts. *Hutch. Carr.* § 149; 4 *Elliott, R. R.* §§ 1432, 1435; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Hoffman v. Railroad Co.*, 85 Md. 391, 37 Atl. 214; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318, 21 L. Ed. 297; *St. Louis Ins. Co. v. St. Louis, T. H. & I. R. Co.*, 104 U. S. 146, 26 L. Ed. 679; *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; *Taylor v. Railroad Co.*, 87 Me. 299, 32 Atl. 905; *Dunbar v. Railway Co. (S. C.)* 15 S. E. 357, 31 Am. St. Rep. 860; *Ortt v. Railway Co.*, 36 Minn. 396, 31 N. W. 519; *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.*, 67 Mich. 110, 34 N. W. 269; *McEacheran v. Railroad Co.*, 101 Mich. 264, 59 N. W. 612; *Hoffman v. Railroad Co. (Kan. App.)* 56 Pac. 331. "A railroad company is a carrier of goods for the public," says Mr. Justice Field in *Myrick v. Railroad Co.*, supra, "and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or their consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such lines,—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it." By the English rule, and by the doctrine of some of the courts of this country, such

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a receipt of goods for transportation, without else to indicate the intent of the parties concerned, implies, *prima facie*, an undertaking or contract upon the part of the carrier to convey them to the point of destination, as indicated by the direction or consignment, whether the carrier owns or controls all the lines of transportation in the route of their travel or not. Hutch. Carr. §§ 146, 147; 4 Elliott, R. R. § 1435. The distinction between the two rules is that by the former the duty implied is to carry the goods to the end of the receiving carrier's line, and there to deliver them to the next carrier in the route, to be forwarded thereby (*Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, *supra*); while by the latter the duty implied is to carry them through to their destination. The engagement, of course, may be varied in either case by express contract, or the circumstances attending the shipment may raise a different obligation by implication; and thus, in order to exempt the carrier beyond its own lines, under the English rule, there must be an express or implied limitation or restriction of primary liability; and to enlarge the liability, under the American rule, there must be an express or implied undertaking to that effect, aside from the mere receipt of the goods destined to a point beyond the route of its own authority.

The so-called American rule is perhaps better grounded in equal justice towards the shipper and carrier, and in public policy, and is therefore preferable upon principle, as well as by the preponderance of American authority. Both the parties to the shipment were cognizant of the fact that defendant's line of railroad extended no further east than Huntington. This is admitted by the averments in the separate defense, which must be taken as true as against the demurrer, and by the stipulation entered into relative to the facts attending the controversy; and it must be supposed that the contract was entered into in view of the legal rights of the shipper and carrier. As the bill of lading contains the whole contract, and does not depend for substantiation upon the proof of extraneous facts or circumstances, the controversy is resolved into a question of construction, which is solely for the court to determine. Plaintiff's counsel submit that, by a proper construction of the contract, it should be made to read as follows: "The Oregon Railroad & Navigation Company has on this 17th day of September, 1898, received from I. H. Taffe, at Celilo, Oregon, one F. G. E. car, No. 14,685, containing nine and one-half tons of fresh salmon, consigned to Cheseboro Bros., Fulton Market, New York City, which it agrees, in consideration of the freight to be charged therefor, to transport without unnecessary delay, by the fastest passenger train service, to Fulton Market, and there deliver the same to the consignee." Such a rendition, it is insisted, is the reasonable deduction to be made from the manner in which the contract was drawn, and the particular kind of service to be afforded. Referring to the bill of lading, it will be

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noted that the blank following the words "to be transported to" is left unfilled, and the words "on fastest passenger train service" are written, which allows them to stand in preference to printed matter. As to the blank, it is apparent from an inspection of the instrument what was intended to be inserted. There is a direction immediately beneath not to insert points not on the line of this system; so that its manifest use was for points on the line of the O. R. & N. Co.'s transportation system, and could not serve the purpose of inserting any point of destination beyond its lines. And there is no particular significance to be attached to the fact that the blank was not supplied, as it cannot be assumed, in the absence of evidence respecting the point intended to be inserted, and in direct contravention of the instruction on the face of the instrument itself, that it was intended for the place of final destination. The omission, therefore, must be regarded as clerical in character, and affords no suggestion of significance for construction. *Myrick v. Railroad Co.*, supra; *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.*, supra; *Phillips v. Railroad Co.*, 78 N. C. 294; *Ortt v. Railway Co.*, supra; *Hoffman v. Railroad Co.*, supra. A further reading of the first clause makes it more apparent that the place of destination, where beyond the lines of defendant's system, was not intended, for there is inserted parenthetically a clause, in effect, that, if such freight is to be forwarded beyond the lines of the company, then it is to be delivered to such company or carriers whose line may be considered a part of the route to the place of destination; and thus does the contract, by its very terms, read into it the law as we have ascertained it to be when the shipment is to a point beyond the lines of the company receiving the goods for carriage,—containing simply a direction denoting the place of consignment. The particular kind of service to be rendered was transportation "on the fastest passenger train service." The stipulation must certainly prevail to its fullest import, but what is its significance? Looking upon the face of the bill of lading, we find by the first clause that the goods were received of Taffe, "marked and consigned as noted below," and the written part denotes a consignment "as above," and in either instance the reference is to the direction, "Chesebro Bros., Fulton Market, New York City," so that the consignment is nothing more than the ordinary one of designation by direction of the place of destination, without restriction or enlargement. This brings us to the especial and emphatic contention of counsel, which is that the service contracted for was a special one; that is to say, that the company agreed to carry a perishable quality of freight by fastest passenger train service, and, being a service that neither it nor any connecting road was required or obliged to perform, that therefore it must be presumed plaintiff contracted for through transportation. We are not satisfied that such conclusion follows. Plaintiff,

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by the allegations of his complaint, has, in effect, made the defendant, at least, if not all connecting lines, a common carrier of the kind of freight thus offered, and in the manner designated; for it is averred that, "when requested to do so by shippers, it was the custom and practice of the said defendant, as such common carrier, in consideration of the payment of the sums charged therefor by the defendant, over and above the amount charged for ordinary freight transported by freight trains, to receive perishable freight in refrigerator cars, requiring speedy transportation, and to attach such cars containing such freight to, and transport the same over said line and connecting lines by and as a part of, said passenger trains, to the said city of New York." This allegation is admitted by the answer, except as there is any implication of the practice or custom on the part of the defendant to accept and carry such freight in the manner designated to the city of New York, or any point beyond its lines. Under the conditions thus existing, the plaintiff has made the defendant, at least, a common carrier of fresh salmon, in the manner described, for it could reject no freight of a like kind for like transportation by fastest passenger train service. 4 Elliott, R. R. §§ 1474, 1475; Beard v. Railway Co., 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Railroad Co. v. Young (Tex. Civ. App.) 28 S. W. 819; North Pennsylvania R. Co. v. Commercial Nat. Bank, 8 Sup. Ct. 266, 31 L. Ed. 287. Now, are we to assume that the defendant is the only company that is a common carrier in that sense, or would it be more reasonable to assume that, by reason of the fact that it was willing to accept goods of the kind to be carried by a rapid service, its connecting roads are doing the same thing? If it was once conceded that its road was the only one conveying the special kind of freight on the particular condition, the presumption might be said to follow, without more, that it was the intentment to contract for carriage to destination; otherwise the freight would not have been received. But such is not the case here, and we would rather incline to the view that the parties contracted with reference to the preferable assumption that other connecting lines were customarily engaged in like freight traffic, and were therefore bound to the same service when like freight is offered. But whether the freight was received to be transported as by a common carrier or in a private capacity, there must be an express or implied undertaking to carry beyond the lines of the carrier first receiving the goods for transportation, and such a one is not deducible from the contract relied upon. The stipulation contained upon the back, and expressly made a part of it, also lends support to this view. The expression "on the fastest passenger train service" is simply a designation as to how the freight should be carried, being the kind of service contracted for, which language is employed with reference to the car of fresh salmon "consigned as above." It does not indicate an

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intendment of carriage to destination any stronger than if it had read "on ordinary freight train service"; so that the agreement on the back should be accorded the same weight that it would have if the contract was one with reference to the receipt of ordinary freight, to be carried in the ordinary way. The stipulation referred to is that "the company will not be responsible or liable for any loss, damage, or injury to property, except upon its own lines, and will not be responsible for any loss, damage, or injury to property after the same shall have been tendered to any connecting carrier or freight man for further transportation." So that, construing the contract as a whole, in the light of the circumstances and conditions under which it was entered into and executed, it must be held to be an undertaking to carry to Huntington, and there deliver in good order to the Oregon Short Line Railroad Company, the next connecting line. True, an ordinary freight bill of lading was used, but it is reasonable to suppose that it would not have been used if it had not been considered appropriate to evidence the true nature of the contract.

We have not overlooked the case of Colfax Mountain Fruit Co. v. Southern Pac. Co. (Cal.) 50 Pac. 775, 40 L. R. A. 78. That case, however, turns upon the interpretation of the meaning of the word "forward," which was used in three different and distinct clauses of the contract; and, it having been necessarily used in two of them in the sense of "to carry," it was quite logically held to have been employed in a like sense in the other clause, so the contract was interpreted as an undertaking to carry to destination, and this upon the face of the instrument itself. The case could not, therefore, be controlling.

From these considerations, the judgment of the trial court will be reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

DUNBAR v. CHARLESTON & W. C. RY. CO.

(*Supreme Court of South Carolina, Feb. 15, 1902.*)

[40 S. E. Rep. 884.]

Bills of Lading—Notice of Contents.

A carrier delivered to a shipper a receipt containing a provision that the shipment was received subject to the regular bill of lading of the carrier, for which the receipt could be exchanged: *held*, that the shipper had such notice as put him on inquiry and bound him by the terms and conditions of the bill of lading.

Same—Liability for Injury on Connecting Line.*

Under a bill of lading providing that a carrier shall not be liable for loss not proved to have occurred on his own road, or after the property is ready to deliver to the next carrier, the carrier is not liable for damages to freight on a connecting line.

*See *Hartley v. St. Louis, etc., R. Co.* (Iowa), ante, 569, and foot-note.

Dunbar v. Charleston & W. C. Ry. Co

Appeal from common pleas circuit court of Sumter county; Buchanan, Judge.

Action by C. B. Dunbar against the Charleston & Western Carolina Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Bellinger & Townsend, for appellant.

Izlar Bros., for appellee.

GARY, A. J. This is an action for the recovery of \$305 damages to three car loads of melons shipped over the defendant's railway. The case was tried before his honor, J. H. Hudson, and a jury, on the following stipulation as admission of facts: "For the purposes of the trial of the above entitled action, it is agreed between counsel for the plaintiff and defendant that the following facts are admitted to be true: That the melons described in the complaint were the property of the plaintiff, and were delivered by him to the defendant at the times and place mentioned in the receipt signed by C. R. Black, agent, and Exhibits A, B, and C, and put in evidence by the plaintiff; and said receipts were then given him by the agent of the defendant. That the plaintiff never received, nor had any other notice of any other bill of lading than said receipt, except such notice as is contained in the notice printed on said receipt. The said melons were carried by the defendant and delivered to the Charleston & Savannah Railway Company, a connecting carrier of the defendant, en route to New York, at Yemassee, on the days mentioned in the written statement of Mr. Mitchell, agent of the Charleston & Savannah Railway Company, which statement is marked 'Exhibit D,' and put in evidence by the defendant. The said melons were negligently delayed in transit between Yemassee and New York several days beyond the time within which they should have reached their destination, by reason of which delay the plaintiff has been damaged in the sum of \$150. That the freight charges were paid by the consignee in New York. That the blank bill of lading marked 'Exhibit E,' put in evidence by the defendant, is the regular bill of lading in use by the defendant at the time of the shipment of the melons, and referred to by the agent of the defendant in said receipt. But the plaintiff had no actual knowledge of the terms and conditions in said bill of lading, Exhibit E, nor any notice of its existence, further than the printed notice on said receipt." The exhibits above mentioned were as follows: Exhibit A: "R. & S. Nos. 28, 574. A. A. 54. This shipment is accepted subject to the terms and conditions of the company's regular bill of lading, for which this receipt may be exchanged. Charleston and Western Carolina Railway Co. Original. Millitt, S. C., July 26, 1899. Received from C. B. Dunbar the following articles, in apparent good order (except as otherwise noted), to be transported, in accordance with the following directions, to S. B. Bownes & Co., consignee, New

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York, destination, N. Y. state. [Revenue stamp.] Articles: One C. L. melons, rel. Car S. F. & W. 8153. Freight guaranteed by consignee. —, consignor. C. R. Black, agent. R. B. turpentine, kerosene, and other oils must be entered on separate tickets, as they will be received and forwarded only at company's convenience. Shipper's receipt." Exhibits B and C are similar to the foregoing, except in unimportant particulars. Exhibit D is immaterial, and Exhibit E contains the following provision: "Said company [the defendant] agrees to carry to the said destination, if on its road or its portion of the through route, otherwise to deliver to another carrier on the route to said destination;" also the following provision: "No carrier shall be liable for loss or damage not proven to have occurred on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee." In charging the jury, his honor said: "My construction of the contract is that the railroad undertook with the plaintiff to ship these cars of melons to the city of New York upon the terms and conditions of their regular bill of lading, Exhibit E. Its responsibility for injury or loss beyond their own line was not incurred. And therefore I instruct you to find a verdict for the defendant." The jury rendered a verdict in favor of the defendant.

The plaintiff appealed upon exceptions, the first of which is as follows: "(1) That his honor, the presiding judge, erred in concluding that the bill of lading, Exhibit E, constituted a part of the contract between plaintiff and defendant, it being admitted that the plaintiff had no notice or knowledge of the terms and conditions contained in said Exhibit E, nor of the use of such bill of lading by the company, other than the printed notice on the receipt given him at the time of the shipment of the melons." The words, "This shipment is accepted subject to the terms and conditions of the company's regular bill of lading, for which this receipt may be exchanged," were sufficient to put the plaintiff on inquiry, and if it had been pursued with due diligence would, unquestionably, have led to actual knowledge of the terms and conditions contained in the regular bill of lading. Under such circumstances the law imputes to him knowledge of the facts which he would have gained by pursuing the inquiry. This exception is, therefore, overruled.

The second exception is as follows: "(2) That his honor, the presiding judge, erred in not holding that the receipts, Exhibits A, B, and C, evidenced the entire contract between plaintiff and defendant, and that thereunder the defendant was liable for damages to said melons arising from negligence of the carrier between Yemassee and New York, though beyond the line of their own road." We fail to see how it can be successfully contended that Exhibits A, B, and C evidenced the entire contract between the parties, when the stipulation in the receipt which the plaintiff accepted is that the ship-

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ment was subject to the terms and conditions of the company's regular bill of lading, of which, we have shown, he must be held to have had notice. The case of *Hill v. Railroad Co.*, 43 S. C. 461, 21 S. E. 337, conclusively shows that the defendant was not responsible for the loss or injury beyond its own line. This exception is also overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

FT. WORTH & D. C. RY. CO. *v.* MASTERSON *et al.*

(*Supreme Court of Texas, March 6, 1902.*)

[66 S. W. Rep. 833.]

Carriage of Live Stock—Establishment of Quarantine Line.

Under Rev. St. 1895, art. 5043c, providing that the commission provided for in article 5043a may establish quarantine lines against Texas or splenetic fever for the protection of the live stock of the state, as qualified by article 5043k, providing that any quarantine line fixed by such commission against such disease shall "conform" to the federal quarantine line established by the United States department of agriculture, a state quarantine line against such disease, which was not identical with a federal line, which had also been established, was void.

Same—Duty to Receive and Carry—Void State Quarantine Line.*

The existence of a void state quarantine line against infected cattle will not justify a railroad company in violating the provisions of Rev. St. 1895, art. 4535, requiring all railway companies to receive freight from connecting lines, and to transport it to destination or to the next connecting line, by refusing to receive and transport cattle consigned on a through bill of lading issued by another company to a point within such void quarantine line, but which defendant company would only have had to carry to a connecting point not within such line.

Certified question from court of civil appeals of Second supreme judicial district.

Action by R. B. Masterson against the Southern Railway Company and another, in which the Ft. Worth & Denver City Railway Company was impleaded by defendants, upon questions certified to supreme court.

Stanley, Spoons & Thompson, for appellant.

W. P. McLean and D. W. Humphreys, for appellees.

BROWN, J. The court of civil appeals for the Second supreme judicial district has certified to this court the following statement and question:

"The above-styled case is pending before us on an appeal from a judgment in favor of appellee and against appellant for damages because of its refusal to receive and transport two cars of cattle shipped from Leighton, Alabama, on a through bill of lading to Seymour, Baylor county, Texas, made by the Southern Railway Company. The cattle were hauled over the Southern Railway and connecting lines to Ft. Worth, and

*See *Carter v. Wilmington & W. Ry. Co.* (N. Car.), 24 Am. & Eng. R. Cas., N. S., 131, and extensive note, 134 et seq.

were there tendered to appellant by the Cotton Belt Railway (which road hauled them into Ft. Worth), to be carried and delivered to appellant's next connecting line of railroad in the direction of said place of destination. Appellant's line of railroad connected with the Wichita Valley Railroad at Wichita Falls, and the latter is the only railroad running to Seymour. It was an independent line of railroad. In carrying said cattle en route to Seymour appellant would necessarily have delivered or tendered them to said Wichita Valley Railroad at Wichita Falls. On being tendered the cattle at Ft. Worth by the Cotton Belt Railway, appellant refused to receive them on the ground that there was in force a quarantine line against Texas fever established by the live stock sanitary commission of Texas, which quarantine was fixed along the east line of Baylor county, and lay between Wichita Falls and Seymour. Appellant's line of railroad between Ft. Worth and Wichita Falls did not cross said quarantine line, nor in any wise infringe on the same. Appellant proposed to receive said cattle from its said connecting line, the Cotton Belt Railway, and to carry them to Wichita Falls, under a new contract by which the cattle were to be consigned to the owner at Wichita Falls, but refused to receive them under the through bill of lading, and refused to receive them to be carried to its connecting line at Wichita Falls. Appellee declined to make a new contract, as proposed by appellant. The cattle were unloaded by the Cotton Belt at Ft. Worth in consequence of the refusal of appellant to receive them, and were sold by the latter company as provided by law. At the time referred to, there was established and in existence another quarantine line against Texas fever by authority of the secretary of agriculture of the United States, which was west of Baylor county, and which was not crossed by the railroad in going from Ft. Worth or Wichita Falls to Seymour. The difference between the said two quarantine lines was that the state quarantine line placed Archer, Throckmorton, and Baylor counties in the protected territory, and the national line left them on the outside of said protected territory. The restrictions and regulations pertaining to each line prohibited the transportation of cattle from territory south and east of the respective lines to territory north and west of said lines. Each of said lines provided alone against Texas or splenetic fever. Appellee Masterson's ranch was west and north of the federal line, and in King county. Seymour was the nearest railroad station to said ranch.

"Appellant was not a party to the contract of shipment, and was only liable, if at all, by reason of being an intermediate connecting line in the chain of railroads between the initial and terminal points of said haul. Article 4535, Rev. St. 1895, provides, in substance, that every railroad in this state must receive freight from connecting lines when tendered, and transport the same to destination, if on its line,

and, if beyond its line, to the next connecting line. Assuming that this statute applied to the transaction under consideration, unless an exception existed in the fact that the state quarantine line against splenetic fever or Texas fever justified the refusal to receive the shipment when tendered to appellant at Ft. Worth, the question arose as to the validity of the state line, and, if valid, whether the appellant was justified in its refusal to take the shipment in view of the fact that the quarantine line was located beyond its haul of the same. The evidence in the record shows that Masterson, before purchasing the cattle, made inquiry of the Southern Railway Company at Leighton as to whether there were any quarantine restrictions in the way of shipping them through to Seymour. He purchased the cattle upon the assurance of said company that there was no quarantine line to prevent the cattle being carried directly through to Seymour. He brought this action against the Southern Railway Company and the Cotton Belt for his damages, alleging substantially a breach of warranty on the part of the Southern Railway because of stoppage of the shipment on account of the quarantine. These defendants impleaded appellant as a party defendant, alleging that its refusal to receive the cattle was illegal, because the ground of refusal, to wit, the said state quarantine line, was insufficient, because the state sanitary commission had no authority to establish said line east of Baylor county, it being different from the national line; second, because, if valid, appellant could have carried the cattle to the next connecting line en route to destination without in any wise violating said quarantine. These two defendants prayed for judgment over against appellant for whatever sums plaintiff might recover against them. Plaintiff, by supplemental petition, adopted that part of said two defendants' answers, and prayed in the alternative against the Southern and Cotton Belt Railways for his damage, if there existed a legal quarantine, and, if not, then against appellant or his damages.

"The foregoing facts and issues rendered the validity or invalidity of the said state quarantine line the controlling question as to the liability of appellant. It becomes material, in determining the question of the validity of that line, to decide whether the power conferred in article 5043c, Rev. St. 1895, upon the live stock sanitary commission of Texas, to protect the domestic animals of this state from contagious or infectious diseases of a malignant character, is limited by article 5043k, requiring conformity with the federal line in establishing a quarantine line against Texas or splenetic fever only. Under the articles named, has the state commission power or authority to establish a quarantine line against Texas or splenetic fever, different in its location from the one established by the national authorities against Texas or splenetic fever? And was the quarantine line established by the state authorities east of Baylor county

void because of a want of authority to make said line? Do articles 5043c and 5043k prohibit the state commission from making a quarantine line against Texas or splenetic fever different in respect to its location from that established by the secretary of agriculture against Texas or splenetic fever? And in this case was appellant warranted and justified in its refusal to receive and carry said shipment to its next connecting line en route to Seymour?"

The articles of the Revised Statutes referred to in the question read as follows:

"Art. 5043c. It shall be the duty of the commission provided for in article 5043a to protect the domestic animals of this state from 'all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere, and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to co-operate with live stock quarantine commissioners and officers of other states and territories, and with the United States secretary of agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this state against Texas or splenetic fever,' etc.

"Art. 5043k. Any quarantine line that may be fixed by the live stock sanitary commission against Texas or splenetic fever shall be so fixed as to conform to the federal quarantine line established, or that may be established, by the United States department of agriculture."

By the first-quoted article, the commission was directed to co-operate with the "United States secretary of agriculture," but, after four years' experience, that law was changed by the enactment of article 5043k, whereby the power of the commission to establish a quarantine line against "Texas or splenetic fever" is limited to "conformity" with the line established or to be established by the "department of agriculture for the United States." It was the intention of the legislature, in the enactment of article 5043k, to take from the commission discretion in fixing a quarantine line against Texas or splenetic fever, and to require the commission to adopt the line then established or which might thereafter be established by the department of agriculture of the United States. The word "conform" was used in the sense of "comply with," "adopt." The purpose was to make one line. We cannot conceive how the commission could fix the line so as to conform to a line established by the "United States department of agriculture" except by adopting the latter line. If this was not the intention, why require conformity to lines which might thereafter be fixed by officers of the United States?

We answer: The line established by the commission of

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Texas, not being in conformity with the line established by the department of agriculture of the United States as quarantine against "Texas or splenetic fever," was without authority of law and void.

Article 4535, Rev. St., provides: "All railway companies doing business in this state shall be and they are hereby required to receive from all other railway companies with which they may connect at the state line of this state, or at any place within this state, or at any or all places where they may cross the line of any other railway doing business or operating a line of railway in this state, all freights and passengers coming to it from such connecting line and destined to points on its line, or to points beyond its line to any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received," etc. By the terms of this statute, the appellant was required to receive the cattle from the Cotton Belt Railway, and to carry them to the connecting line at Wichita Falls, which would have been required to receive the cattle from the appellant.

We answer further: The existence of the quarantine line established by the sanitary commission of Texas afforded no justification to the appellant for refusing to receive and carry the cattle of the appellee to Wichita Falls.

We, however, do not intend to intimate that, if that line had been valid, its existence would have excused the refusal to carry the cattle to a point not within the forbidden territory. That question is not certified.

NASHVILLE, C. & ST. L. R. CO. v. SMITH.

(*Supreme Court of Alabama, Feb. 13, 1902.*)

[31 So. Rep. 481.]

Ratification of Agent's Contract to Carry Freight.*

Though the agent has no authority to make the contract for delivery of freight at a certain point, the carrier, having undertaken to carry it out, is liable for loss from negligent performance amounting to breach of contract.

Appeal from circuit court, Marshall county; Jas. A. Bilbro, Judge.

Action by Jasper Smith against the Nashville, Chattanooga & St. Louis Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*As to when carriers are bound by their agent's contracts, see 1 Rap. & Mack's Dig. 54 et seq.; 9 Cent. Dig., col. 121 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 351.

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Oscar R. Hundley, for appellant.
O. D. Street, for appellee.

DOWDELL, J. The first assignment of error is based upon the refusal of the trial court on motion of the defendant to strike the complaint filed in the circuit court. Rulings on motions to strike from the file pleadings will be reviewed on appeal only when properly presented by bill of exceptions. There is nothing contained in the bill of exceptions relative to the court's ruling on the motion to strike.

The testimony of the plaintiff, which was taken on interrogatories at the instance of defendant under the statute (article 4, c. 46, p. 582, Code 1896), was offered and introduced in evidence by plaintiff without objection on the part of the defendant, and objection raised for the first time on appeal will not be considered.

It was conceded that the defendant railroad company delivered freight to the Tennessee Transportation Company for delivery at certain landings on the Tennessee river, but not at the landings where the goods in question were to be delivered; but this was not made known to the plaintiff, and he had no knowledge of any such limitations as to the landings in the shipment of freight by the defendant when he made the verbal agreement with the agent of the defendant company. Whether the agent had authority to make the contract or not with plaintiff becomes immaterial in view of the fact that the defendant company undertook to carry out the same, and the loss to the plaintiff resulting from such a negligent performance of the contract as amounted to a breach of the same. While the action is in assumpsit on the contract, still, on the undisputed evidence here, the result would be the same if the action had been in case. As was said in *Melbourne v. Railroad Co.*, 88 Ala. 449, 6 South. 762 (and the principle is applicable here): "It is familiar law that when one undertakes gratuitously to perform some act with respect to the property of another, he is not bound to do it; but, if the act is performed, it must be done with some degree of care, and the mandatory will be held responsible for any injury and loss that may result from a want of due care in the manner of his performance." Story, Bailm. §§ 165, 174, 175.

We find no error in the record, and the judgment is affirmed.

GERMAN STATE BANK v. MINNEAPOLIS, ST. P. & S.
STE. M. RY. CO.

(Circuit Court, D. Minnesota, Fourth Division, September 18, 1901.)

[113 Fed. Rep. 414.]

Railroads—Carriage of Mail—Negligence—Loss of Package—Liability.*
A railroad carrying mail for the government owes no duty to the ad-

*See 2 Rap. & Mack's Dig. 1 et seq. ; 18 Am. & Eng. Enc. Law 850 et seq.

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dressee of a package rendering the railroad liable for the loss of the same through its negligence.

Same—Degree of Care.*

Conceding that a railroad may be held liable by the addressee of a package for the loss of the same in the mail through the railroad's negligence, the degree of care required is only the reasonable care exacted of an ordinary bailee for hire.

Same—Complaint—Allegation—Sufficiency.

A complaint in an action against a railroad company alleged the mailing of a valuable package to complainant, and its carriage by the railroad company to its station, where it was alleged that the mail sack was delivered to defendant's station agent, whose duty it was to safely care for the mail sack during the night; that the agent left the station, and that a road master or foreman of the railroad entered the station, and with a false key opened the mail sack; and that such foreman had access to the office or room where the mail sack was deposited, and was permitted to go and come therefrom at will: *held*, that the facts stated in the complaint failed to show a lack of ordinary care on the part of the railroad.

Action by the German State Bank against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment sustaining demurrer to the complaint, with leave to plaintiff to amend.

Dale & Allen and Geo. W. Brown (Henry Conlin, of counsel), for plaintiff.

Alfred H. Bright, for defendant.

LOCHREN, District Judge. This case is presented by demurrer to the complaint, which alleges, in substance, that on November 10, 1900, the Metropolitan Bank deposited in the United States mail at Minneapolis, in a prepaid and duly registered letter or package, addressed to the plaintiff at Harvey, N. D., the sum of \$3,000 in currency, which therefore became the property of the plaintiff, who was then insured against the risks of the transportation of such money by the Banker' Mutual Casualty Company of Des Moines, Iowa, under a policy of insurance, a copy of which is attached to the complaint. The mail sack containing said package was carried in a mail car in defendant's railroad from Minneapolis to Harvey under the exclusive control of postal clerks, who delivered said mail sack, duly locked, and containing said package, to defendant's night station agent at said Harvey, who was not an employee of the post-office department, and whose duty, on behalf of defendant, it was to safely care for and guard said mail sack and its contents during the night, and safely deliver the same to the postmaster at the Harvey post office, which was within 80 rods of the railway station. The night station agent deposited the mail sack in a room in the depot, and absented himself therefrom for a time, during which one Soule, a road master or foreman of defendant, entered the room, and with a key which he had caused to be made unlocked the mail sack, and took said package, and stole the money. The Bankers' Casualty Company, pursuant to its contract of insurance, has paid said sum of \$3,000 to the

*Sec 2 Rap. & Mack's Dig. 1 et seq.; 18 Am. & Eng. Enc. Law 850 et seq.

plaintiff, who brings this suit for the benefit of the insurer.

1. The federal government has from the first assumed the absolute and exclusive control and performance of the postal service of the country under the express provision of the constitution authorizing congress to establish post offices and post roads. The function so exercised is governmental, as it is calculated to produce revenue, more or less as the policy of the government may dictate; and it is intended to minister to the general welfare by furnishing to all persons, and between all parts of the country, and reaching to other countries, means of communication as rapid and safe as can be devised, and protected by the safeguards provided by law. The government prescribes what matter shall be mailable, and the rates of postage, and the manner of payment of the same. These matters are regulated by law, and are not left open for negotiation or contract. No idea of contract has any place in the scheme. The government tolerates no competitor in the exercise of this function, but forbids under penalties the sending or carrying of sealed letters otherwise than in its mails. It permits, but does not compel, the sending of packages which may contain articles of value in its mails; but if a person avails himself of this permission the package enters the mail, and is entitled to the same care as any letter and no greater. The provision for registration applies equally to letters and other packages, and only aids in tracing their course and carriage. The government itself receives, handles, assort, and carries the mails, and delivers the same as addressed. The postal officials, of whatever grade, and carriers, of whatever kind, are the servants of the government,—the hands which it employs in the performance of its functions. With the exceptions presently to be mentioned, I think it may be safely asserted that these servants are not in privity with, and owe no duty to, any one except the government, to whom their fidelity is sought to be assured by provisions of the postal laws, penal and otherwise. The exceptions are the cases where the duty of such servant, whether postmaster, clerk, or distributing carrier, requires him to assume to do an act personal to a known or designated individual,—such as receiving from him a letter or package to be placed in the mail,—in which case he would owe him the duty of using ordinary care to place it in the mail, or in the proper receptacle for mailing; or if such servant should receive through the mail a letter or package which it became his duty to deliver to the person addressed, he would owe that person the duty of using ordinary care in making safe and prompt delivery of the same. A railway company carrying the mails does not assume as to them any of the duties or responsibilities of a common carrier. No one but the government can require or receive such service, and the duties and responsibilities of such railway carrier of mails are measured by the terms of the contract, and by the provisions of the

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postal laws and regulations. The mails are not in the care, custody, or control of the railway company during the carriage, but under exclusive control of the railway postal clerks, in separate cars or compartments, fitted especially for that service. As to the safety of the persons of such clerks the railway company assumes the same duty which rests upon it respecting other persons lawfully being carried on its trains. But as to the mail itself it has no duty except what it owes the government, its employer. It has no notice or means of knowledge of the contents of mail sacks, nor as to who has sent or who is entitled to receive the letters or packages. It never was employed by such persons, has no privity with them, and owes to them, severally and personally, no duty whatever. Were it otherwise, then when, as often happens, cars are wrecked and burned, and the mail destroyed, as the result of negligence for which the railway company is in law responsible, so that recoveries against it are had for personal injuries, and for all destruction of luggage and merchandise, the courts would be burdened with actions to recover for the loss of valuable packages claimed to have been in the mail; affording such opportunity for fictitious claims as might speedily compel railways to refuse such hazardous employment. The fact that no such litigation has ever arisen is decisive against the claim that a railway company owes any duty to the sender or addressee or owner of the contents of any letter or package contained in the mails which can be made the basis of an action at law. As above stated, the law requires that all letters sent from place to place be sent by the mail. But there is no such requirement in respect to valuable packages, which may lawfully be sent through express companies, or by other responsible carriers. The postal service has become so efficient, speedy, and safe that, in view of its cheapness, many persons send valuable packages by post, taking the risk themselves, rather than pay more to responsible carriers, who make charges with some reference to the value of the article and consequent amount of the risk assumed.

2. But if it were conceded that under some circumstances an action of this kind can be maintained by the owner of a package lost from the mail against a railway carrier of the mail, no liability can arise under the facts stated in this complaint. If any privity can be imagined as existing between the railway carrier between distant places and the owner of a package in the closed mail sack, and that the railway company owes such package owner a duty to exercise care in the carriage of that especial package, it would not be that degree of care and of responsibility which rests upon a common carrier, but at most the reasonable care which an ordinary bailee for hire must exercise in respect to the article which is the subject of the bailment. There is in such case no responsibility if the article is stolen, even by a servant of the bailee, if the bailee has taken and caused to be taken reasonable care

under the circumstances. Under the allegations of the complaint, and upon the theory of the concession suggested, the bailment would not cease until the mail sack containing the package was delivered at the post office at Harvey, which was within 80 rods of defendant's depot. It is alleged that the mail sack was delivered to defendant's night station agent, whose duty it was "to safely care for and guard said mail sack and its contents during the night." It must be inferred from this that the mail sack reached that depot too late in the night to be received at the post office before the following morning, and hence must be stored in the depot, as in a warehouse, for the night. There is no allegation that it was not put in a safe place in the depot, guarded by such sufficient locks as would be reasonable in such case. The only attempted allegation of negligence is that the night station agent, after receiving the mail sack, "did negligently leave said depot, and did absent himself therefrom for a period of time to this plaintiff unknown, and thereby defendant failed to safely keep and care for said mail sack and its contents." As I cannot hold that defendant's duty in respect to the mail sack under the circumstances required that the station agent should sit on the mail sack the balance of the night, and keep awake, I think the allegation just quoted fails to charge any negligence.

The remaining allegations are to the effect that one Soule, a road master or foreman of the defendant at Harvey, entered the depot, and with a false key opened the mail sack, and stole the package of money. The employment of Soule by the defendant, and the allegation that he had "access to the office or room where said mail sack was deposited, and was permitted to go and come therefrom at will," do not sustain any inference of lack of reasonable care. No facts are stated tending to show that defendant had any reason to regard Soule as other than honest and trustworthy; and the responsible character of his employment indicates that he was so regarded. The allegation that he had access to the room, and was "permitted to go and come therefrom at will," with defendant's knowledge, is too vague and indefinite, and requires too heavy a draft on the imagination, to lead me to regard it as a statement that Soule had, with defendant's knowledge and consent, such access or permission in the nighttime, or at any time other than when the occupations of his employment might properly direct him there.

The statement of the second ground of demurrer only specifies what may be a separate reason for sustaining the demurrer on the general ground.

The demurrer is sustained, with leave to the plaintiff to amend its complaint on or before the November rule day.

CAU *v.* TEXAS & P. RY. CO.*(Circuit Court of Appeals, Fifth Circuit, January 7, 1902.)*

[113 Fed. Rep. 91.]

Carriers of Goods—Limitation of Liability for Loss by Fire—Validity.*

A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire, where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

B. K. Miller, for plaintiff in error.

N. W. Finley, W. W. Howe, W. B. Spencer, and C. P. Cocke, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This was an action by the plaintiff in error to recover the value of certain cotton delivered to the defendant in error to be transported from Texarkana, Tex., to the port of New Orleans, La., at an agreed charge for freight of 60 cents per 100 pounds. The petition alleged that, in evidence of the contract, the company delivered to the plaintiff in error its certain bills of lading; that while the bales of cotton were awaiting further shipment, but after they had been received by the railway company as a common carrier and were in its possession as such, and after it had issued its bills of lading to carry the same, the whole of the cotton was destroyed by fire. The petition alleged, further, that by the third clause of the bills of lading the railway company attempted to limit its liability as a common carrier, declaring that it should not be liable for any damages to, or destruction of, the cotton caused by fire; that this clause is wholly inoperative, null, and void against the petitioner, on the following grounds: (1) That plaintiff did not receive any consideration from the railway company for such limitation of its common-law liability; (2) that the destruction of the cotton by fire was due to, and caused by, the negligence of the company, its agents and servants; (3) that the cotton was received by the railway company prior to the issuance of the bills of lading, and it was without authority, after the receipt of the cotton as a carrier, to limit its liability under the common law. The answer, besides the general issue, set up specially the terms of the third clause of the bills of lading, which, so far as necessary to recite, expressed "that neither the Texas & Pacific Railway Company nor any connecting

*As to the validity of contracts exempting carrier from liability for losses not resulting from negligence, see extensive note, 20 Am. & Eng. R. Cas., N. S., 681 et seq.

Cau v. Texas & P. Ry. Co

carrier handling said cotton shall be liable for damage to, or destruction of, said cotton by fire." The case came on for trial, and, the evidence having been closed, counsel for the defendant moved the court to direct a verdict in favor of the defendant, which motion was granted, and the jury, under the direction of the judge, returned their verdict, "We, the jury, find a verdict in favor of the defendant," upon which judgment was duly entered. In acting on the plaintiff's motion for a new trial, the learned judge of the circuit court said:

"The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law, and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common-law liability, without the fire clause. Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time filled them, and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the fire clause. Shippers have been held bound by the fire clause in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under such circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew, or must be held to have known, that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud, or misrepresentation by the carrier."

So far as it affects this case, the statement of the law embraced in the foregoing extract from the trial judge's opinion is fully supported by the leading case of *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. 107, 18 L. Ed. 170, which has been cited with approval by the supreme court as late as the case of *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419.

We have carefully examined the record submitted to us on this hearing, and concur in the view taken by the trial judge that there is nothing in the evidence which would invalidate the bills of lading for duress, concealment, fraud, or misrepresentation by the carrier.

The judgment of the circuit court is therefore affirmed.

CHARNOCK v. TEXAS & P. RY. CO.*(Circuit Court of Appeals, Fifth Circuit, January 7, 1902.)*

[113 Fed. Rep. 92.]

Carriers of Goods—Limitation of Liability for Loss by Fire—Validity.*

A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

B. K. Miller, for plaintiff in error.

W. W. Howe, W. B. Spencer, and C. P. Cocke, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This was an action very similar to that of Jovite Cau against the same defendant (just decided), 113 Fed. 91. It was for the value of cotton delivered to the defendant carrier, which issued to the shipper a bill of lading with the fire exemption clause identical in terms with that given in the Cau Case. The cotton was received on a country or plantation switch, which the defendant had put in about the time of the construction of its main line, and which for 10 or 11 years had been used by the planters conveniently adjacent thereto precisely in the manner that this shipment was made. There was a small platform and a small shelter to be used in connection with sending and receiving freight, according to its charter and the other conditions at the time of handling, but no agent or employee of the company had ever been put or kept there for the purpose of receiving and guarding freight there received or delivered. The long-established practice was for shippers who had produce to be transported from that point to notify the nearest station agent of the fact, and of the number of cars desired, when the defendant would furnish the cars as requested, and, as soon as they were loaded by the shipper, promptly take them by the first one passing of its local freight trains to the point of destination. There is no evidence that any question or protest was made by this shipper to the contract as limited in the bill of lading. We concur with the trial judge in holding that the evidence does not tend to show negligence on the part of the carrier. There was no dispute as to the goods having been received by the carrier, nor as to the loss falling within the terms of the fire exemption clause. If there was negligence upon the part of the carrier the burden of proving that fact was on the plaintiff, and, as we have said, the proof offered by the plaintiff did not,

*See preceding case, and foot-note.

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in our opinion, tend to show such negligence. This case falls clearly within the authority of *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985; *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. 107, 18 L. Ed. 170.

The judgment of the circuit court is affirmed.

PENNSYLVANIA R. CO. v. MIDVALE STEEL CO.

(*Supreme Court of Pennsylvania, Feb. 24, 1902.*)

[51 Atl. Rep. 313.]

Demurrage.

A rule of a carrier imposing a charge of \$1 per day for time a car remains unloaded after 48 hours from time it is ready for delivery to the consignee, the reasonableness of which is not denied, is manifestly reasonable, and need not be submitted to a jury with direction so to find.

Same—Pleading.

Where declaration for demurrage on cars is accompanied by account giving exact details as to each car, an affidavit of defense makes no issue by stating generally that the demurrage rule is not applicable to defendant, because in many cases the detention was caused by reloading, and that this is embraced in the charge of delay in unloading; defendant showing that it has the means of specifying particulars by stating that it will produce at the trial its own records to prove that plaintiff's were inadequate as a basis of claim.

Same—Same.

A declaration averring that plaintiff and defendant were parties to a contract of shipment over plaintiff's road, that since the demurrage rule was adopted it has formed part of the contract of shipment, sufficiently avers an implied contract for payment of demurrage.

Same.*

Shippers do not have to be consulted by carriers in framing demurrage rules; it is enough that they are reasonable.

Same—Notice.

A shipper is sufficiently charged with knowledge of a demurrage rule of a carrier by the regular rendering to it of bills for violation thereof.

Appeal from court of common pleas, Philadelphia county.

Action by the Pennsylvania Railroad Company against the Midvale Steel Company. From decree discharging rule for judgment for want of sufficient affidavit of defense, plaintiff appeals. Reversed.

David W. Sellers, for appellant.

George Wharton Pepper, for appellee.

DEAN, J. The plaintiff, as a common carrier corporation, before 1893, adopted, by its proper officers, this rule: "A charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for

*As to right to charge demurrage for detention of cars by shipper, see extensive note, 20 Am. & Eng. R. Cas., N. S., 540 et seq.

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delivery to such consignee, for each day or part of day after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded; the said charge being payable by the consignee or person receiving the car." From July, 1893, up to December, 1898, the defendant, which is a large iron and steel manufacturer at Nicetown, in Philadelphia county, received from plaintiff, consigned to the steel company, about 14,000 cars laden with iron, coal, and other products used in its manufacturing business. A large number of these cars were detained beyond the 48 hours—some for many days—before being unloaded. Plaintiff charged for the delay as provided by the rule quoted, and presented monthly bills for the same to defendant, which it refused to pay. In an affidavit of defense it denied the right to make the charge, and consequently its liability to pay. Plaintiff then took a rule to show cause why judgment should not be entered for want of sufficient affidavit of defense. The aggregate of the charges within the years named was \$4,048. The learned Presiding Judge Arnold of the court below in his opinion discharging the rule says: "Conceding that a carrier may charge a consignee a fixed rate in the nature of demurrage for the detention of its cars beyond a reasonable time for discharging their cargoes, and that the rate claimed in the present suit is a reasonable rate, yet there is sufficient denial of the facts upon which the plaintiff bases its claim to prevent the entry of a summary judgment, and therefore we discharge the rule for judgment for want of a sufficient affidavit of defense." From this decree plaintiff brings this appeal, arguing that the court erred in refusing to make the rule absolute.

The plaintiff has an unquestioned right as a common carrier to make reasonable rules to speed the unloading of its cars. Cars are for the transportation of freight, not for its storage. A rule on its face may apparently be reasonable, either as to time allowed for unloading or as to the extent of the penalty by which it is sought to enforce a reasonable time limit, or the reasonableness of the rule may be doubtful, in either of which cases the evidence would be for a jury. But no such question arises here, for the affidavit does not deny the reasonableness of this rule as applicable to others. It only denies, on other grounds, the right of plaintiff to apply it to these shipments. Where the rule is manifestly a reasonable one, as this one is, both as to time and charge, the court will not take up time by instructing a jury to find the fact, any more than it would instruct a jury on undisputed facts to find that a collecting bank had protested a negotiable note within a reasonable time after nonpayment. Although the question has not been heretofore directly passed upon by this court, it has been decided in several of the states. *Miller v. Mansfield*, 112 Mass. 260; *Railroad Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916; *Kentucky Wagon*

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Mfg. Co. v. Ohio & M. Ry. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326; and other cases. As before noticed, with the plaintiff's statement is filed a complete copy of its account, giving car initials, number, contents, exact hour of arrival, date of release, number of days detained, and amount of charge. None of the cars charged for were kept less than three days, and many of them from seven to twenty-one days. So far as it was in the power of a railroad company to give notice to a consignee of every material fact, the defendant got this notice from plaintiff when the bills were rendered. Wherein does the affidavit make an issue of fact which ought to go to a jury? It sets out that the demurrage rule is not applicable to it because large numbers of the cars consigned to it were unloaded promptly, but, being reloaded as outgoing shipments, the detention caused by reloading is embraced in a charge of delay in unloading. The plaintiff having sworn to its detailed statement, having positively averred the number, date of arrival, and date of release as to every car, it was the duty of the defendant to meet this charge by specifying the cars detained for other reasons than by neglect to unload. The least error in plaintiff's account, whether overcharge as to delay, mistake in car, or consignment to defendant, when consigned to some other, could easily have been detected and exposed in the affidavit of defense. Every delay occasioned not by unloading, but by reloading, could have been particularly averred. We do not say that, if defendant had been unable to do this, either by neglect to keep accounts or by their loss or destruction, that the court below might not, under the circumstances, have refrained from entering judgment. But the defendant makes no averment of inability to produce accounts which will specify the alleged errors in plaintiff's account; on the contrary, it avers that "the defendant will produce at the trial its own records, carefully prepared under a system adapted to prevent error, for the purpose of proving that the plaintiff's records are inadequate as a basis of claim." It thus asserts that it has in its possession accurate accounts, which at the trial in court before a jury will defeat plaintiff's claim in part at least; yet with seeming caution it refrains from specifying the particulars then before it. This defeats the very purpose of the affidavit of defense law. Its object was to hasten final judgment by setting out in the affidavit the groundlessness of the whole or part of plaintiff's claim, or by averring that it had been paid, and how, in whole or in part. The parties might then, in that early stage of the proceedings, be brought together. The plaintiff might abandon his claim in whole or in part. This affidavit specifies nothing in answer to plaintiff's full and complete specifications. Every averment is an inference from a "carefully prepared" system of bookkeeping of its own, without a copy of the particulars which would demonstrate the errors of plaintiff's charges. "The affidavit should state

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specifically and at length the nature and character of the defense relied on." *Bryar v. Harrison*, 37 Pa. 233. "The spirit of the affidavit of defense law abhors evasion and equivocation, and punishes them by entering judgment." *End. Affid. Defense*, § 377; *Woods v. Watkins*, 40 Pa. 458.

The further objection to plaintiff's claim is that it does not aver expressly or impliedly that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad, and this is averred; and then further it is averred that since the demurrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. *Kentucky Wagon Co. v. Ohio & M. Ry. Co.*, *supra*. There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage. As to the one it cannot exceed a lawful rate; as to the other it cannot exceed a reasonable charge. Within these bounds it is presumed in the interests of its stockholders and the public to properly conduct its own business. The defendant further avers in its affidavit that "prior to 1893, or at any time subsequent thereto," it had no knowledge that plaintiff had established a rule relating to the demurrage charges set forth in its statement, and that no notice of such rule was ever communicated prior to the bringing of this suit; but then it says: "At various times during the year 1893, and subsequently, bills have been rendered to the defendant by plaintiff for demurrage charges, but said bills did not contain notice of any regulation or rule on which said charges were or could be based, nor were the charges in said bills consistent with the terms of the regulations upon which the plaintiff has declared." This is inconsistent and evasive, both in language and substance. That plaintiff did adopt such rule is clearly shown by its uniform charges. It was not bound to serve a verbatim copy of the rule on defendant. That could have shown nothing so specifically as the charge, which plainly says what detention is allowed, what excess is charged, on what car, and on what goods. And that defendant had full knowledge is shown by its own admission that bills for violation of the rule were regularly rendered. We think this affidavit falls short of what the law calls sufficient. It raises no issue of fact calling for the intervention of a jury, and the law is clearly with the plaintiff. Therefore the decree discharging the rule is reversed, and the record is remitted to the court below, with directions to enter judgment for plaintiff, unless other legal or equitable cause be shown to the court below why such judgment should not be entered.

RICHMOND, N., I. & B. R. CO. v. RICHARDSON.

(Court of Appeals of Kentucky, March 5, 1902.)

[66 S. W. Rep. 1035.]

Carriers of Live Stock—Connecting Line—Liability for Loss—Execution of Shipping Contract—Fraud or Mistake.*

Where plaintiff had been accustomed for many years to ship live stock over the line of defendant railroad company under a form of contract making defendant liable only for loss occurring on its line, it must be presumed that, when plaintiff applied to defendant's agent for a car to ship his stock, he anticipated shipping it in the usual way; and though the contract, which was in the usual form, was not read to him or explained, it cannot be inferred that there was any fraud or mistake.

Appeal from circuit court, Estill county.

"Not to be officially reported."

Action by C. Richardson against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company to recover damages for breach of contract to carry live stock safely. Judgment for plaintiff, and defendant appeals. Reversed.

Wallace & Harris, for appellant.

Grant E. Lilly, for appellee.

HOBSON, J. On January 19, 1893, appellee shipped 95 hogs and 3 cows, loaded in a car at Irvine, Ky., consigned to Green & Embry, at Cincinnati, Ohio. The stock were loaded late in the afternoon, and were taken by appellant immediately to Richmond, Ky., and there delivered to the Louisville & Nashville Railroad Company, to be forwarded to their destination. By the usual course of business, the car should have reached Cincinnati that night; but for some reason it was not taken up by the connecting line, and did not reach Cincinnati until the 22d. It was then delivered, with four of the hogs missing, one dead, and the others in bad condition. The hogs were in good condition when turned over by appellant to the Louisville & Nashville Railroad Company. There was no delay or neglect on appellant's part. What was the real cause of the delay in the car between Richmond and Cincinnati is not shown by the proof. On the first trial of the case there was a verdict in favor of the plaintiff for \$240. On appeal to this court a new trial was ordered. The court, after stating fully the facts of the case, and quoting at length the written contract of shipment, said: "It seems to us that the contract of shipment of the hogs in question does not make the appellant liable for any failure or injury, except such as occurred on its line of road between Irvine and Richmond;

*As to what constitutes assent to stipulation limiting carrier's liability, see 9 Cent. Dig., col. 611 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 289 et seq.; 2 Rap. & Mack's Dig. 168 et seq.

As to whether assent of shipper is conclusively presumed from acceptance of bill of lading, see extensive note, 20 Am. & Eng. R. Cas., N. S., 710 et seq.

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and, inasmuch as there was no plea of fraud or mistake in the execution of the contract of shipment, the court below erred in allowing any parol proof as to the terms of the contract of shipment. No instruction should have been given to the jury authorizing them to find against the appellant for any delay or damage to the hogs after the delivery of the car containing the hogs to the Louisville & Nashville Railroad Company at Richmond." 43 S. W. 465. On the return of the case to the trial court the plaintiff amended his petition, charging fraud or mistake in the execution of the contract of shipment, and pleading that the contract made by him with the company was one of through shipment from Irvine to Cincinnati. Issue was joined on these allegations. The case was tried anew, and resulted in a verdict in favor of the plaintiff for \$200.

There is little contradiction in the evidence. The proof shows that the plaintiff applied to the agent of appellant at Irvine for a car, saying that he wished to ship the stock. The agent ordered the car. The plaintiff loaded his stock on it. By the time he got it loaded, the engine was waiting for it, and immediately started on with it. He then came to the station, and he and the agent signed the contract of shipment. The contract was not read to him or explained. He had been shipping stock for 20 years; had shipped, according to his own testimony, as many as 50 cars. The company used only this form of bill of lading. He had often shipped on it before, and knew that appellant's road only ran to Richmond. The price for the shipment of the stock under their contract was \$36. If not shipped under it, the price of shipping it was \$95. The plaintiff and the agent valued the hogs, and the valuation they fixed was placed in the contract; also the rate, \$36. This evidence utterly fails to show there was any fraud or mistake in the execution of the contract. When the plaintiff applied to the agent for a car to ship his stock, he must be presumed to have anticipated shipping it in the usual way, and on the usual contract in use by the company, on which he had been shipping for years. There was nothing in the transaction to evidence a different arrangement, and the defendant not being liable beyond its own line, by the express terms of the contract, and having turned over the stock without delay and in good condition to the Louisville & Nashville Railroad Company at Richmond, according to appellant's expectation, and in the usual course of business, the court should have instructed the jury, under the evidence, to find for the defendant.

Judgment reversed, and cause remanded, with directions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

SAN ANTONIO & A. P. RY. CO. v. THOMPSON.*(Court of Civil Appeals of Texas, Feb. 5, 1902.)*

[66 S. W. Rep. 792.]

Injury to Freight from Delay.

A railway agent agreed to have a refrigerator car at B. on May 11th. On May 12th a refrigerator car arrived, and the vegetables left on the 13th; their destination being changed several times after shipment. Plaintiff testified that they were damaged while waiting for the second car, but also that when they arrived at their final destination they had begun to rot; that he changed their destination because he thought he might sell them at another point, and a delay of a day would not hurt them: *held* insufficient to warrant a finding of damage by reason of delay at B.

Same.*

A railroad company chargeable with unreasonable delay in holding a car containing vegetables is liable for the natural consequences thereof, even beyond its own line.

Same—Measure of Damages.

Where a railway agent at the point to which vegetables were consigned agrees to send the car containing them as soon as it arrives to another point, and thereby their destination is changed to the latter, the measure of damages for delay in holding the car at the original destination is the difference in values at the changed destination.

Appeal from Bee county court; Fred G. Chambliss, Judge.

Action by Edgar Thompson against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Proctors, for appellant.

S. J. Lancaster, for appellee.

JAMES, C. J. This action is to recover damages to a car load of vegetables shipped from Beeville over appellant's road. According to the testimony, certain facts are clear. These facts are that plaintiff on May 10, 1900, ordered a refrigerator car, which the agent at Beeville agreed to have there on the morning of the 11th. The car tendered on that morning was not a refrigerator car, and plaintiff refused to use it. The next day a refrigerator car was brought there, and the vegetables loaded upon it by plaintiff, and it left Beeville on the night of the 13th, destined for Kansas City. On the morning of the 14th, plaintiff had the agent at Beeville change the destination to Dallas. That morning plaintiff reached Kenedy, and there had the agent again change the destination to Waco, as he thought he might dispose of the produce there. He arrived at Waco that night at about 8 o'clock. The car arrived there the same night at 11:30. The car was held at Waco some days, and was then sent on to Dallas by plaintiff's instruction. There was no testimony whatever that would have warranted a finding that there was any delay in the trans-

*See generally, *Yazoo & M. V. R. Co. v. Millsaps* (Miss.), 17 Am. & Eng. R. Cas., N. S., 269, and note, 272 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 233 et seq.; Id. 450 et seq.; 9 Cent. Dig., col. 334 et seq.; 2 Rap. & Mack's Dig. 62 et seq.; Id. 753 et seq.

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portation of the car from Beeville to Waco, nor in the transportation from Waco to Dallas. Nor is there any testimony upon which a jury could have found damage to the vegetables by reason of the delay of 24 hours at Beeville. True, plaintiff says generally that they were damaged by being kept in wagons, awaiting the second car; but his other testimony shows that, if there was any such damage, it was not material, because he testified that when the car arrived at Dallas the vegetables had begun to rot. They had evidently not begun to rot at Beeville, or he would not have testified that they had begun to rot at Dallas. He evidently had no idea they had begun to rot before then. He further stated that he had the destination changed to Waco because he thought he might sell the vegetables to better advantage there, and the delay of a day at Waco would not hurt the vegetables. This testimony of plaintiff himself is wholly inconsistent with damage having occurred to them at Beeville, awaiting shipment. Upon the evidence contained in this record, we are of opinion that no issue should have been submitted to the jury, except that bearing on the delay at Waco. Upon this matter there was a well-defined issue of fact, as to whether or not that delay was owing to the fault of plaintiff or of defendant. The submission of other issues not really existing in the case naturally tended to obscure the real issue.

The question of defendant's liability for damages occurring on the Missouri, Kansas & Texas Railway does not arise. There is nothing to show delay or undue handling on that line; and if it should be found that defendant was chargeable with unreasonable delay of the car at Waco, and this was the cause of the damaged condition of the produce, defendant would be liable for all the natural consequences thereof during the entire transit,—even beyond its own line.

As to the measure of damages: If it should be found that defendant's agent at Waco agreed, as plaintiff contends, to send the car on to Dallas as soon as it should arrive at Waco, and thereby the destination was again changed to Dallas, the measure of damages should be based upon the difference in values at Dallas.

Reversed and remanded.

ROSENTHAL *et al.* v. WEIR.

(*Court of Appeals of New York, March 4, 1902.*)

[63 N. E. Rep. 65.]

Carriers—Liability—Stoppage in Transitu—Neglect.*

Where a contract of carriage limits the liability of defendant for a loss to the amount specified therein, it does not affect the right of action of a shipper against the common carrier for its negligence in delivering goods after notice from the shipper to stop them in transitu, which it agrees to do, and does not affect the amount of the carrier's liability.

*See extensive note, 16 Am. & Eng. R. Cas., N. S., 245 et seq. ; 9 Cent. Dig., col. 198 et seq.

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Appeal from supreme court, appellate division, First department.

Action by Abraham S. Rosenthal and others against Levy C. Weir, president of the Adams Express Company. From a judgment of the appellate division (66 N. Y. Supp. 841) affirming a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Carl A. De Gersdorff and R. R. Rogers, for appellant.

Julius J. Frank, for respondents.

GRAY, J. The plaintiffs on March 31, 1897, sold to Goldsmith & Co., in Dallas, Tex., certain silk goods, and delivered them to the Adams Express Company for carriage to the buyers. They received a bill of lading from the express company, which, among other things, provided that it should not be liable for loss or damage "from any cause whatever unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor, in any event, shall the holder thereof demand beyond the sum of fifty dollars, at which the above property forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so specified in this receipt." There was no insurance for special value, and upon the bill of lading were stamped the words, "Value asked and not given." The plaintiffs, learning that Goldsmith & Co. were insolvent, on April 1st sent to the office of the express company and demanded that it stop the goods in transit. The express company's agent agreed to do so, after ascertaining that it could be done, if the plaintiffs would pay for a telegram. They assented, and the telegram was at once made out by the agent and sent to the agent at Dallas, where it was received. For some reason the merchandise was nevertheless delivered to the buyers, and the goods were never returned by them to the plaintiffs, except a small part, of the value of \$37.41. Thereupon the plaintiffs commenced this action to recover damages of the defendant, to the extent of the value of the goods, by reason of its failure and neglect to obey the directions of the plaintiffs and to return the goods. At the conclusion of the trial both parties moved for the direction of a verdict, whereupon the court directed a verdict for the plaintiffs, and the judgment upon that verdict has been affirmed.

As the case comes here, all the facts must be regarded as having been determined in the plaintiffs' favor, inasmuch as there was no request made for the submission of any questions of fact to the jury, and there was sufficient evidence to support the decision of the trial judge in directing the verdict. Therefore the question upon this appeal is one which relates to the measure of the liability of the defendant. On the one hand it is claimed for the appellant that that liability is necessarily limited by the terms of the bill of lading to a recovery of \$50,

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while on the other hand it is insisted for the respondents that the recovery is not so limited, as the transaction was not governed by the bill of lading. The appellate division has taken the latter view; holding, in effect, that the defendant had undertaken to perform the duty, at the request of the plaintiffs, of stopping the merchandise in transit, and, for its neglect to use reasonable care in performing that duty, it is liable, to the extent that the plaintiffs suffered by the loss of their property. It was the view of the learned court that this undertaking of the defendant was something apart from, and independent of, the contract of carriage, as expressed in the bill of lading.

I think the judgment is right. The plaintiffs had the right to stop the goods in transitu, by giving notice of their claim to the carrier, in whose possession the goods were, actually or constructively. The notice need not be given to the person in actual possession of the goods and may be given to the principal. In the latter case, to be effectual, it must be given at such time and under such circumstances that the principal, by the exercise of reasonable care and diligence, may communicate it to his agent in time to prevent a delivery of the goods to the buyer. The defendant was, as forwarder, a principal, to whom notice was properly given. The rule appears to be settled upon authority. See *Benj. Sales*, p. 180, where the authorities are collated. The appellant does not dispute the rule with respect to the right of stoppage in transitu, but contends that the limitation in the bill of lading defining the liability of the carrier by the agreed value of the goods controls, in all events. As the case comes to us, the neglect of duty or the wrongful conduct of the defendant in delivering the goods after the notice must be regarded as established. The action, therefore, is actually founded on the tortious act of the defendant, and not on its contract of carriage. The exercise of the right of stoppage in transitu by the plaintiffs put an end to the contract of carriage, and revested the possession of the property in them. They are to be regarded as having retaken the goods. *Litt v. Cowley*, 7 Taunt. 169; 23 Eng. Ruling Cas. p. 411; *Cross v. O'Donnell*, 44 N. Y. 661, 665, 4 Am. Rep. 721; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. 485, 493, 17 Atl. 671, 12 Am. St. Rep. 885; *Reynolds v. Railroad Co.*, 43 N. H. 580, 592; *Jones v. Earl*, 37 Cal. 630, 99 Am. Dec. 338. The relation of the parties changed. The defendant, from the time it was notified, and directed its agent not to deliver the goods to the buyers, in legal contemplation, held the plaintiffs' property as their bailee. When, through the disobedience or neglect of its agent or servant, the goods were delivered to the buyers, the defendant became liable for their then value to the plaintiffs, not upon contract, but in tort. As it was said in a case quite similar in its facts, though not involving the same legal question, by Lord Chief Justice Cockburn (*Pontifex v. Rail-*

way Co., 3 Q. B. Div. 23), "the contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to the contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious." If the carrier delivers the goods to the purchaser after notice not to do so, it is liable in trover to the seller. *Litt v. Cowley*, supra. The bill of lading, however broad its language with respect to the value of the goods, which the holder might demand, must be read with reference to its purpose. It related to the undertaking to carry and forward the goods to the consignees, and to the incidents attendant upon its execution. The price paid for the carriage by the shippers was fixed by the reduced valuation of the goods. Upon the stoppage in transitu, the defendant held the goods as the plaintiffs', and the law created a new relation, to which the bill of lading had no reference. The goods were to be returned to the plaintiffs. We must assume that it was possible for the defendant to do so, and its failure or neglect was wrongful, and created a liability altogether different from that which was intended to be governed by the bill of lading.

For these reasons, I think the judgment appealed from should be affirmed, with costs.

CULLEN, J. I concur in the result on the ground that the trial court might, on the evidence, have found that the plaintiffs were not notified at the time of shipment of the conditions and limitations prescribed in the receipt, nor asked the value of the goods. *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693. I dissent, however, from the view that the provision of the receipt limiting the liability of the carrier to the sum of \$50 unless the value of the goods is declared does not apply to a claim of the character of that now before us. This condition is not similar to those often found in contracts for shipment, by which it is sought to relieve the carrier from the consequences of its own negligence and fault,—provisions which the courts so strictly construe against the carrier, and the effects of which they are so astute to avoid, that it may be doubted whether it would not be better, even for the carrier, were they held void as against public policy, which is the law in many jurisdictions. The limitation under consideration is fair and reasonable. Not only is the compensation for carriage based on the value of the goods, but the care and attention given by the carrier and his servants is necessarily influenced and affected by the knowledge that the goods are of great or of little value. Concealment of value, though without any improper motive, on the part of the shipper, is therefore considered an imposition on the carrier, and relieves the latter from liability in excess of the stipulated amount, "unless something more in its conduct is shown than negligence to carry safely and to delivery promptly." *Magnin v.*

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Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442. Contracts of this character should be upheld and construed as fairly as other contracts. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.

The action is for negligence. Defendant's line did not extend to Dallas, but ended at Kansas City, and the delivery complained of was made by the connecting company. Therefore there was in fact no conversion by the defendant, but its fault lay in its failure to properly notify the connecting carrier. The action was therefore necessarily brought in its present form, and not for conversion. The right of stoppage in transitu, as the term indicates, springs out of the contract of transportation. It exists only where the possession is in a person employed to forward or transport the property to its destination, and it ends with delivery at the termination of the transit. *Harris v. Pratt*, 17 N. Y. 249. The right of the shipper to stop the delivery is absolute, "and the carrier is bound to obey, leaving the justification of the stoppage with the seller as concerns the sale parties, since the due exercise of this right is at the seller's and not the carrier's peril." *Schouler*, Prop. § 565. The right of stoppage in transitu is therefore a necessary incident of the contract of carriage, and though it may be that after notice of its exercise the strict liability of the carrier ceases, and it thereafter becomes responsible only as a warehouseman, which is the case where the consignee fails to accept the goods, still the relation of warehouseman is contractual, and in either case the carrier assumes that relation solely by the virtue of its original contract of carriage. In other words, when a carrier contracts to carry, it also contracts to stop the goods, or to hold them as a warehouseman, in certain contingencies; and there is no reason why the limitation of its liability for the value of the goods should not equally apply to all the responsibilities it assumes under the contract, whether of one kind or another. The only point decided in *Pontifex v. Railway Co.*, 3 Q. B. Div. 23, was that an action against a carrier for his failure to stop the goods in accordance with directions from the shipper was in tort, not on contract. I do not see how that doctrine is material to the question under discussion. It is sufficient, however, to say that an action against a carrier, even for breach of its contract of carriage, may be brought indifferently on the contract or in tort. *Catlin v. Adirondack Co.*, 11 Abb. N. C. 377.

The judgment should be affirmed, with costs.

O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur with GRAY, J. CULLEN, J., concurs in result, with memorandum, with whom PARKER, C. J., concurs.

Judgment affirmed.

SAN ANTONIO & A. P. RY. CO. v. BARNETT.*(Court of Civil Appeals of Texas, Dec. 2, 1901.)*

[69 S. W. Rep. 474.]

Jurisdiction—Amount in Controversy—Interest.

Where the amount, with interest thereon from a certain date, claimed as damages in an original petition, did not exceed the court's jurisdiction at the time such petition was filed, an amended petition, claiming the same amount, with interest from the same date, filed at a time when the accrued interest had raised the damages above the jurisdictional amount, was improper, but did not necessarily defeat the court's jurisdiction over the proper amount.

Pleading—Amendments.

Upon another trial the amended petition might be amended so as to bring the amount within the court's jurisdiction.

Carriage of Live Stock—Limiting Liability—Failure to Read Contract.

In an action against a railroad company for damages to cattle received during their carriage over its own and a connecting line, defendant introduced written contracts for the shipment of the cattle to a point on defendant's line, and which limited its liability to damage occurring on its own line. Plaintiff claimed that the cattle had been loaded under a verbal agreement for through carriage, and that he had been forced to execute the written contracts in order to get the cattle moved, and that, although the written contracts called for delivery at a point on defendant's line, the real contract was for through shipment. The only evidence as to the written contracts showed that they were executed by plaintiff's direction in order to secure free transportation for his helpers: *held* that, in the absence of any evidence of fraud, compulsion, or want of time to read the written contracts, they must be taken as merging all previous understandings between the parties.

Same—Pleading.

Plaintiff having pleaded the written contracts as well as the verbal, the court properly refused to instruct the jury to find a verdict for defendant, since plaintiff was entitled to recover for any damages occurring on defendant's own line.

Same—Effect of Waybill on Written Contract.*

The waybill issued by defendant for the guidance of its employees, which denominated plaintiff's shipment as a through live stock waybill to a point on the connecting line, via the point on defendant's line specified in the written contracts, did not change or affect the terms of such written contracts.

Partnership between Connecting Lines—Evidence—Waybills.

The waybill afforded no proof of partnership or agency between defendant and the connecting line.

Effect of Shipping Report on Written Contract.

The shipping report signed by plaintiff and the agent of the connecting line at the connecting point could not change or affect the written contracts between plaintiff and defendant.

Same—Competency of Witness to Testify as to Value of Stock.

In an action against a railroad company for damages to cattle received during carriage, it would not be necessary for a witness acquainted with values at the point of destination and with stock generally, and who saw the cattle at their destination point, to have seen or known the cattle when shipped or en route, in order to testify as to their value in the condition in which they arrived at their destination, and as to the condition they would have been in if they had been properly carried, providing such testimony was elicited by proper hypothetical questions.

*See generally, 9 Cent. Dig., col. 167 et seq.; 4 Am. & Eng. Enc. Law (2d Ed.) 521 et seq.; 1 Rap. & Mack's Dig. 601 et seq.; 2 Id. 156 et seq.

San Antonio & A. P. Ry. Co. *v.* Barnett**Same—Competency of Witness to Testify as to Cause of Condition of Cattle.**

Such witness would be competent to testify from the appearance of the cattle as to what caused their condition, provided he gave the data upon which he based his opinion.

Same—Testimony of Conductor as to When Train Was Due at Connecting Point.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the declaration of defendant's conductor would be admissible to prove the time the train carrying the cattle was due at the connecting point provided, if such time was material for any purpose.

Appeal from Karnes county court; A. J. Parker, Judge.

Action by R. L. Barnett against the San Antonio & Aransas Pass Railway Company and the Gulf, Colorado & Santa Fe Railway Company. Judgment was rendered in favor of defendant the Gulf, Colorado & Santa Fe Railway Company on its plea to the jurisdiction, and from a judgment in favor of plaintiff against defendant the San Antonio & Aransas Pass Railway Company it appeals. Affirmed as to the Gulf, Colorado & Santa Fe Railway Company, and reversed as to the San Antonio & Aransas Pass Railway Company.

Proctors, for appellant.

Atkinson & Abernethy and A. J. Bell, for appellee.

JAMES, C. J. Appellee sued in the county court for damages by reason of the failure of appellant and the Gulf, Colorado & Santa Fe Railway Company to properly and safely transport a shipment of eight car loads of cattle from Karnes City, Tex., to San Angelo, Tex. Plaintiff's first amended original petition, upon which the case went to trial, alleged substantially as follows: That on August 26, 1898, plaintiff delivered 408 head of cattle to defendant the San Antonio & Aransas Pass Railway Company at Karnes City for transportation to San Angelo, and that its agent there contracted with plaintiff to receive and ship and transport same over its line to Cameron, and over the Gulf, Colorado & Santa Fe Railway Company lines from Cameron to San Angelo, with reasonable care, speed, and diligence, at a certain rate, to plaintiff as consignee; that defendants did not so carry and deliver the cattle, but that they negligently delayed the cars upon which the cattle were loaded at various places for many hours, which caused them great injury by reason of their being so confined in the cars, and in muddy and insufficient pens, and being so long without food and water; that defendants' servants handled them so roughly in loading and unloading, and in feeding and watering them, and in causing the cars to be jerked and thrown around against each other and other cars, that many of the cattle were thrown down and against each other and the cars, and bruised and injured, and lost in flesh and value. The petition charges that 7 of them were killed in the cars by this treatment, of the aggregate value of \$175, and 16 head, of the aggregate value of \$400, were so injured that they

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died after being unloaded at San Angelo, and that the balance were so injured that they thereby lost in flesh and value \$1 per head, or \$385. The prayer was for judgment against both defendants for the sum of \$960, with 6 per cent. interest per annum from August 28, 1898, or, in case one of the defendants should be found not in fault, then against the other. Judgment was against appellant alone for \$960, with interest as prayed for.

Appellant, the San Antonio & Aransas Pass Railway Company denied making any verbal contract with appellee, and alleged the execution of written contracts; that it was not the agent of the Gulf, Colorado & Santa Fe Railway Company, and that its sole undertaking was to deliver the cattle to the Gulf, Colorado & Santa Fe Railway Company at Cameron, and that the latter received same as a connecting or succeeding carrier, and not as the agent of this defendant; that it was only liable for damages to said cattle on its own line by the terms of said contract; that this defendant safely and expeditiously transported the cattle to Cameron, Tex., the end of its line, and immediately upon their arrival there delivered same in good order and condition; that no damage occurred to the cattle between Karnes City and Cameron; and prayed for judgment as against the Gulf, Colorado & Santa Fe Railway Company, if any damages were adjudged against it.

The verdict and judgment were against appellant for damages as prayed for, and in favor of the Gulf, Colorado & Santa Fe Railway Company on its plea to the jurisdiction. There are no assignments of error which relate to the Gulf, Colorado & Santa Fe Railway Company, and in so far the judgment will be affirmed.

Plaintiff filed a supplemental petition, admitting the signing of the written contracts attached to the answer, but alleged the following facts as to their signing: After the cattle were loaded and delivered to defendant at Karnes City, defendant's agent presented the contracts, demanded that they be signed, and refused to move them unless they were signed, and because of these circumstances he signed them; that at Cameron the Gulf, Colorado & Santa Fe Railway Company required him and it became necessary for him to sign contracts over its road from there to San Angelo; that there was no consideration whatever for the signing of the contracts, and they were signed under duress and compulsion; that if it should be held that the cattle were shipped under the written contracts, and not under verbal contracts, then the shipment was in fact a through shipment, as originally contracted between plaintiff and defendant's agent at Karnes City; that although the written contracts call for the delivery to him of his cattle at Cameron, and although at Cameron new contracts were required to be signed, yet, in truth and in fact, said shipment was intended by plaintiff, and was received and acted upon by both defendants, as a through shipment over their respec-

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tive lines, at a stipulated rate of two cents per hundred pounds. By supplemental answer, appellant denied the making of any verbal contracts; that plaintiff knew that defendant's agent at Karnes City had no authority to make any but written contracts, etc.

First assignment of error: The trial court erred in rendering any judgment whatever in this case, for the reason that said court had no jurisdiction over the subject-matter, in this: That plaintiff in his petition seeks to and did in fact recover in this suit the sum of \$960, with legal interest thereon from August 28, 1898, and therefore said suit and judgment rendered therein are for an amount which exceeds that over which the county court has jurisdiction. The first amended original petition was filed November 27, 1899. The original petition is not in the record, and all we know of it is that it was filed January 26, 1899. The damages, if any, were sustained about August 28, 1898. At the time of filing the suit the amount sued for, say \$960, with 6 per cent. interest, could not have exceeded \$1,000. The cases of *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1031, and *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163, have decided that in cases like this the interest, if allowed, is regarded as damages. *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11, does not, as we understand it, announce any different rule. It has been held, also, that interest as damages may be allowed, although not asked in the petition. *Railway Co. v. Greathouse*, 82 Tex. 105, 17 S. W. 834. In testing the jurisdiction of a court, the distinction between interest as interest and interest allowed as damages may become material. The suit was filed at a time when 6 per cent. interest on \$960 would not have amounted to \$1,000. Consequently the court had jurisdiction. We cannot know from this record what was originally sued for, but presumably it was not for more than is asked in the amendment. The county court, having once acquired jurisdiction, would continue to have it to the maximum extent of its jurisdiction. Any amended petition which increased the amount so as to claim more than \$1,000 in damages (including interest as damages) thereon, which this does, would be improper and be inadmissible (*Ross v. Anderson*, 1 White & W. Civ. Cas. Ct. App. § 1032), but would not necessarily have the effect of defeating the court's jurisdiction over the proper amount. Upon another trial plaintiff may amend his petition in this respect.

The twenty-third assignment is that the court should have given the following requested charge: "The plaintiff has failed to prove the contract alleged by him, and you are instructed to return a verdict for defendant." There may have been sufficient evidence to show an oral contract with defendant's agent to receive and transport the cattle to San Angelo. But written contracts were signed in reference to the cattle which were inconsistent with such oral contract.

As to the circumstances under which these written agreements were entered into, we have the testimony of only one witness, that of G. W. Barnett, a brother of plaintiff. He testified: "I executed the contract for the shipment of two car loads of these cattle because I had business at San Angelo, and wanted a pass to go there. I was authorized and directed by plaintiff to sign said contract. The cattle belonged to R. L. Barnett, who knew of my desire to go to San Angelo, and had two cars of the cattle billed in my name. We had this done because the railroad would pass only so many men under one contract. There were four of us who wanted to go, and we thought some of us might want to return before the others, and I did return before the others. John Elder, Sam Maddox, John McCaughn, Emery Hall, R. L. Barnett, and myself and others were present when the stock were loaded at Karnes City." There were four of these written contracts, signed, respectively, by G. W. Barnett, R. L. Barnett, R. C. Ruckman, and J. W. McCaughn. The above is all the testimony we can find as to the signing of the four written contracts. It does not appear, as is usual in this class of cases, that the agent insisted on the papers being signed before allowing the cattle to be moved out; that the shipper did not know the terms of the writings, and did not have time to read them. On the contrary, it appears that plaintiff himself procured them to be executed, and had their execution in contemplation in shipping the cattle. According to his testimony respecting the oral negotiations with the agent, how are we to understand that four contracts were prepared by the agent, three of them with other parties than himself, unless the agent had been requested by plaintiff to do so? The only person who testifies on this subject says that plaintiff authorized and directed him to sign one of the contracts.

The only reasonable conclusion from the evidence is that plaintiff never understood nor contemplated that the oral negotiations constituted the contract under which the cattle were to be shipped, but that, on the contrary, he contemplated and expected written contracts to be entered into before the cattle left. We find no evidence even as to when the contracts were signed,—whether before or after loading. No circumstances of fraud, compulsion, want of time to read the contracts, etc., appear from any testimony in the case to entitle plaintiff to repudiate these written contracts. They appear to have been deliberately entered into, and, under the foregoing circumstances, must be taken as merging all previous understandings of the parties. By their terms defendant was not liable for injuries occurring beyond its line. The assignment under consideration, however, is not sustained because plaintiff pleaded the written contracts also, under which he may recover for what may have occurred on appellant's own line.

The fact that the waybill issued by defendant for the guid-

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ance of its employees denominated this as a "through line stock waybill from Karnes City to San Angelo, via Cameron & G. C.," could have no effect upon the terms of the contracts with defendant. Neither could the shipping report signed by plaintiff and the Gulf, Colorado & Santa Fe Railway agent at Cameron.

We would not be justified in assuming, though it may be possible, that the testimony as to the contracts will be materially different on another trial. If the case be narrowed down to the obligations of defendant under the written contract, as it ought to have been at the last trial under the testimony, it would be a useless task for us to consider and discuss the many exceptions of appellant to the charges.

There are a number of assignments which relate to testimony admitted. Witnesses should not be allowed, over objections, to testify to the questions concerning values at the place of destination unless they are shown to have knowledge of such subject. *Railway Co. v. Staton* (Tex. Civ. App.) 49 S. W. 278. We do not think it would be necessary for witness acquainted with such values and stock generally, and who saw the cattle at point of destination, to have seen or known the cattle when shipped or en route, in order to testify to the value of such cattle at destination in the condition they arrived there and the condition they would have been in if properly carried, provided proper hypothetical questions were propounded. *Railway Co. v. Greathouse*, 82 Tex. 109, 17 S. W. 834. But it has been held that the witness should state facts, and not simply give his bare opinion as to the difference in values. *Railway Co. v. Wright*, 1 Tex. Civ. App. 404, 21 S. W. 80; *Railway Co. v. Ward*, 2 Tex. Civ. App. 599, 21 S. W. 607; *Railroad Co. v. Hughes* (Tex. Civ. App.) 31 S. W. 412. Such a witness would be competent to testify, from the appearances of the cattle, as to what caused their condition, provided he gave the data upon which he based his opinion.

We are further of opinion that, if it became material for any purpose to prove the time the train was due at Cameron, the declaration of the conductor was admissible. *Railroad Co. v. Barnett* (Tex. Civ. App.) 34 S. W. 139. The waybills which defendant issued for the guidance of conductors afforded no proof of partnership or agency in this case.

It is unnecessary to lengthen this opinion. Reversed and remanded as to appellant the San Antonio & Aransas Pass Railway Company.

WASHBURN-CROSBY CO. v. BOSTON & A. R. R.

(*Supreme Judicial Court of Massachusetts, Suffolk, Jan. 2, 1902.*)

[62 N. E. Rep. 590.]

Bills of Lading—Estoppel to Assert Invalidity.

Plaintiff declaring on a bill of lading cannot thereafter assert its invalidity.

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Carriers of Freight—Delivery to Steamship Company—Unloading on Railroad's Wharf.*

There is a delivery of freight by a railroad company to a steamship company, so as to relieve the railroad company from further liability, as stipulated in its bill of lading on the happening of such event, though it is unloaded on a wharf belonging to the railroad company; the railroad company having given the steamship company notice by letter, which was unanswered, and seemingly acquiesced in, that unloading of steamship freight at that place constituted delivery by the railroad company, and that thereafter it assumed no liability therefor.

Exceptions from superior court, Suffolk county; Francis A. Gaskill, Judge.

Action by the Washburn-Crosby Company against the Boston & Albany Railroad. Verdict was ordered for defendant, and plaintiff excepts. Exceptions overruled.

Henry M. Rogers and John Lowell, for plaintiff.

Samuel Hoar and Woodward Hudson, for defendant.

HOLMES, C. J. This is a suit to recover the value of certain flour shipped by the plaintiff at Minneapolis, consigned to third parties at London, and destroyed by fire at East Boston. There are two counts, the first seeking to hold the defendant as a common carrier on through bills of lading issued by the Western Transit Company and binding the defendant among others, the second, treated by the parties as a count in tort, seeking to hold the defendant for negligence as a warehouseman. At the trial the judge ruled that the plaintiff could not recover upon the second count. As to the first he ruled that if the western portion of Pier No. One at East Boston (where the flour was when destroyed), "was regularly, habitually and uniformly used and occupied by the Johnston Steamship Company in the ordinary course of business of forwarding flour that arrived by the Boston & Albany Railroad, destined for carriage on its steamships, the jury would be justified in regarding it as the steamship pier named in the bill of lading, and if the flour destroyed was there deposited * * * with knowledge of or notice to the Johnston Steamship Company, then the liability of the Boston and Albany Railroad Company had ceased." The judge also ruled that if the flour destroyed was unloaded from the cars of the railroad upon the pier, even though it were not the steamship pier, the obligation of the defendant as a common carrier had ceased and the relation of warehouseman had attached.

The plaintiff excepted to these rulings and consented to a verdict for the defendant subject to its exceptions, with the understanding that if either ruling under the first count was correct the verdict was to stand with reference to that count.

The plaintiff's main argument is upon the first ruling under the first count. It contends that it was not bound by the stipulation in the bills of lading to which the ruling referred

*See generally, *Roy v. Griffin* (Wash.), 22 Am. & Eng. R. Cas., N. S., 596, and foot-note.

and which we shall mention hereafter, and that if it was bound, the defendant was not free until it had made an actual delivery to the next carrier in the line, the steamship company, and that there was no evidence of such delivery, because it did not appear that the steamship company had been notified of the deposit of the goods.

With regard to the validity of the bills of lading, the fact relied on is that when the goods first were shipped the sealer of the railroad receiving them gave a receipt simply acknowledging that the railroad had received the flour and that the bills of lading were issued subsequently upon surrender of the receipt. It is argued that the provisions of the bills of lading are an attempt to cut down the liability already assumed, and by the law of Minnesota are without consideration and void. There are so many answers to this contention that it seems hardly worth while to state any. In the first place the plaintiff declares on the bill of lading, so that it is rather late now to say that it is void. Then we cannot take notice of the law of Minnesota as it was not proved at the trial. *Hackett v. Potter*, 135 Mass. 349, 350. Again the receipt seems obviously to have been understood to be a temporary document issued in contemplation of the substitution of the bill of lading. Again, so far as appears, the receipt bound only the company that issued it and the bill of lading is the first and only contract between the plaintiff and the defendant. We think it unnecessary to go on.

By a clause of the bills of lading applicable to the case, the defendant's liability terminated "on the delivery of said property * * * to the steamship company, or on the steamship pier at the said port" of East Boston. With regard to delivery the main facts are these. The pier where the flour was belonged to the defendant, but there was evidence that the portion west of the railroad track that ran down the middle of the pier was used and occupied for the purpose of receiving goods by the steamship company, whose superintendent had an office there, and that delivery upon the pier was a delivery to the steamship company. It appeared also that the defendant had given the steamship company notice, by a letter which remained unanswered and seemingly acquiesced in, that unloading of steamship freight at that place constituted delivery on the defendant's part, and that thereafter it assumed no responsibility for the same. It is said that these facts show no more than a constructive delivery not sufficient as against the plaintiff in the absence of special notice to the steamship company. The plaintiff also adverts to the fact that the bags of flour were counted before being put on board the steamer as something remaining to be done before delivery was complete. But this last matter may be dismissed, as at least it might have been found to be a precaution taken by the steamship solely for its own satisfaction after delivery to it. The bags were counted by the defendant when they were taken from the car to the wharf.

The facts which we have recited warranted a finding of an actual delivery by the defendant, and therefore the question as to the effect of agreements between carriers discussed in *Hutch. Carr.* (2d Ed.) § 104, need not be considered. The fact that the wharf belonged to the defendant and that the defendant's title might have been made a ground of possession of what was on it by excluding others from access (*Elwes v. Gas Co.*, 33 Ch. Div. 562, 568; *Water Co. v. Sharman* [1896] 2 Q. B. 44) is immaterial, because the title was not used in that way, but the wharf, although probably not technically in the possession of the steamship company (*Kerslake v. Cummings* [Mass.] 61 N. E. 760), was a neutral spot agreed upon for the delivery of the goods (*Insurance Co. v. Wheeler*, 49 N. Y. 616, 621). Compare *Parry v. Libbey*, 166 Mass. 112, 113, 44 N. E. 124. If, then, as might have been found, it was understood in advance that as soon as goods were left upon the wharf by the railroad the steamship company was free to take them at its pleasure and that it was expected to take notice of their presence and to assume responsibility for them without more special notification, the deposit of the flour on the wharf was an actual delivery without more. *Merriam v. Railroad Co.*, 20 Conn. 354, 361, 52 Am. Dec. 344; *Converse v. Transportation Co.*, 33 Conn. 166, 182; *Pratt v. Railroad Co.*, 95 U. S. 43, 24 L. Ed. 336; *Traux v. Railroad Co.*, 3 Houst. 233, 251. See *Insurance Co. v. Wheeler*, 49 N. Y. 616, 622; *Howard v. Daly*, 61 N. Y. 362, 365, 19 Am. Rep. 285.

Enough has been said to show why in our opinion the first ruling under the first count was sufficiently favorable to the plaintiff. We say sufficiently favorable, because the instruction required the jury to find knowledge or notice of the presence of the flour on the part of the steamship company, whereas, according to the cases last cited and plain good sense, it would be enough if there was the understanding between the two companies which we have supposed and which the evidence proved.

Under the agreement made at the trial it seems to be unnecessary to discuss the other ruling upon the first count. We do not see why it was not correct under the eleventh clause of the bill of lading, if not on more general grounds. By that clause the defendant is not liable "in any other respect than as warehouseman, while the said property awaits further conveyance." So by clause three no carrier shall be liable "after said property is ready for delivery to the next carrier." The defendant had contracted only for itself, it was not bound to carry beyond its own road, and there is nothing contrary to public policy in the stipulation. *Courteen v. Kanawha Dispatch* (Wis.) 86 N. W. 176.

The second count was treated by both parties as a count in tort, and therefore the judge was warranted in treating it as such and we shall do the same. Perhaps it is an echo of the old cases in which the primitive *assumpsit* or entry upon

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the business was laid as the inducement to a declaration in tort, the plea being not guilty. *Powtuary v. Walton*, 1 Rolle. Abr. 10, pl. 5; *Coggs v. Bernard*, 2 Ld. Raym. 909, 919. In modern times the assumpsit is generally taken in the sense of contract. *Boorman v. Brown*, 3 Q. B. 511, 526; *Fleming v. Railway Co.*, 4 Q. B. Div. 81.

It is enough to say with regard to the ruling on this count that we see no evidence of negligence on the defendant's part. It is urged as a further ground that the plaintiff had no title because it had sold its drafts, with the bills of lading indorsed in blank attached, to a bank, had received its money, and, if the goods had not been destroyed, would have heard no more about them. As a tort, even when founded on a contract considered not as a promise but as a special relation which gives occasion to the duty and corresponding right, is an injury to a right in rem, the plaintiff must show such a right, and this it fails to do if its whole title at law is gone. We express no opinion with regard to this argument which is not without its difficulties.

It might be said that this case is different from *De Wolf v. Gardner*, 12 Cush. 19, 59 Am. Dec. 165, because there the action was trover and depended upon a present right of possession, whereas this might be treated as an action on the case for the destruction of the plaintiff's general property, if we are to regard the bank as holding only a pledge. *Mears v. Railway Co.*, 11 C. B. (N. S.) 850. For while there is no doubt that transactions like the present put an end to the right of possession of the indorser of the bill of lading, this court has been very cautious not to commit itself unnecessarily as to the precise effect of such indorsements, and it still is open to argument that the general property does not pass. *Bank v. Bayley*, 115 Mass. 228, 230; *Hathaway v. Haynes*, 124 Mass. 311, 313; *Forbes v. Railroad Co.*, 133 Mass. 154, 156; *Hallgarten v. Oldham*, 135 Mass. 1, 8, 46 Am. Rep. 433.

The question has been much discussed and has been the subject of difference in opinion in England, as may be seen sufficiently in *Sewell v. Burdick*, 10 App. Cas. 74. Some American cases seem to regard it as giving security by way of title and not merely by way of constructive possession. *Gibson v. Stevens*, 8 How. 384, 400, 12 L. Ed. 1123; *The Thames*, 14 Wall. 98, 108, 20 L. Ed. 804; *Bank v. Logan*, 74 N. Y. 568, 582, 583. As we have said, we do not think it necessary to decide the matter in this case.

Exceptions overruled.

ALABAMA MIDLAND RY. CO. v. HORN.*(Supreme Court of Alabama, Dec. 20, 1901.)*

[31 So. Rep. 481.]

Carriers—Taking Up Passengers—Starting Train Prematurely.*

If a passenger was induced to attempt to board defendant's train by its immediate invitation, it was under the duty of holding it until she could do so safely, notwithstanding the train may have stopped sufficiently long for her to accomplish that end, and this though she may have been attempting to get on without the knowledge of the conductor or person in charge thereof.

Appeal from circuit court, Crenshaw county; J. W. Foster, Judge.

Action by Carrie F. Horn against the Alabama Midland Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

A. A. Wiley, for appellant.
D. M. Powell, for appellee.

SHARPE, J. By the first count of the complaint on which the case was tried negligence is predicated mainly upon the alleged fact that at the instant plaintiff was thrown by starting of the train she was attempting to board it as a passenger by invitation of an agent or servant of defendant having authority to extend such invitation. This material averment was not negatived by either of the pleas to which demurrers were sustained. If plaintiff was induced to make the attempt by defendant's immediate invitation, defendant was under the duty of holding the train until she could do so safely, and this notwithstanding it may have, as averred in plea "b," stopped sufficiently long for her to accomplish that end. *Railroad Co. v. Stewart*, 91 Ala. 421, 8 South. 708; *Railway Co. v. Smith*, 90 Ala. 60, 8 South. 86, 24 Am. St. Rep. 761; *Railroad Co. v. Curtis*, 23 Wis. 152, 99 Am. Dec. 141; *Maher v. Railroad Co.*, 67 N. Y. 52. The same principle applies though plaintiff may, as averred in pleas "c," "d," and "f," have been attempting to get on without knowledge of the conductor or person in charge of the train. Non constat whether the servant averred to have been acting in this instance was some servant other than the conductor or person in charge of the train, having intrusted to him the duty of receiving and inviting passengers aboard in such way as to bind defendant for negligence in that regard and in respect of starting the

*As to the care required in taking on passengers, see 2 Rap. & Mack's Dig. 386 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 576 et seq.; 9 Cent. Dig., col. 1089 et seq.

As to the nature of their liability, and the degree of care required of carriers of passengers, see monographic note, 24 Am. & Eng. R. Cas., N. S., 7 et seq.

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train before receiving his signal. For lack of such negation, if for no other reason, the special pleas referred to were each subject to the demurrers interposed to them respectively, and the court's action in sustaining those demurrers was free from error.

The judgment will be affirmed.

ALABAMA G. S. R. CO. v. CROCKER.

(*Supreme Court of Alabama, Nov. 28, 1901.*)

[30 So. Rep. 561.]

Liability for Injuries to Children Playing on Turntables.

- One cannot arrange, even on his own property, that which he knows, or, in the exercise of common judgment and prudence, ought to know, will naturally attract others into unsuspected danger; and if a turntable maintained by a railroad company on its own ground is calculated to attract children, or the danger is so apparent that the company ought to anticipate that children will resort there, and an injury results to one of them, it is liable.

Same—Direction of Verdict.*

A six year old boy was injured while playing on a railroad turntable. Previous to his injury two other children had been hurt on the same machine, to defendant's knowledge. After the accident to the other children, the machine had been locked by the company, and several locks broken off and stolen, but at the time of the injury in question it had been unlocked and used, and had not been locked up, and was left unguarded. The turntable was used constantly by day, and frequently at night. The company did not invite the boy to go upon the land, and did not know he was there. The turntable was situated in the midst of tracks within the company's yard limits; the nearest street, and the one on which the boy lived, being 600 feet distant, and it being necessary for him to cross several tracks to reach it: *held* that, though it was proper to refuse an affirmative charge in favor of the company, the court erred in giving an affirmative charge for the boy; the facts not showing negligence in the company, as matter of law.

Appeal from law and equity court, Tuscaloosa county; J. J. Mayfield, Judge.

Action by Robert Crocker, an infant, by his next friend, against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

This was an action brought by the appellee, Robert Crocker, a minor, by his next friend, against the Alabama Great Southern Railroad Company, to recover damages for personal injuries. The complaint, as amended, contained three counts. In the first count the plaintiff sued for \$2,000 as damages for that on February 6, 1898, the said Robert Crocker, being then "six years of age, went upon the turntable kept by the defendant at its depot and yards in the city of Tuscaloosa, Alabama, and, while playing upon it with companions who were of like tender years, had his hip and back caught in or under the same, and badly mashed, lacerated, and bruised, to his damage as aforesaid; and plaintiff avers that the said

*See foot-note, 21 Am. & Eng. R. Cas., N. S., 644.

turntable was attractive to children of tender years, who did not know its dangerous character, but that the same was dangerous for children to play upon, because it was easily turned, and, on account of its construction and great weight, a person being upon it while it was turning was liable to be caught under the framework thereof, and crushed or otherwise injured; and plaintiff avers that said turntable was kept in a public, open place, where many people were constantly passing and repassing, and many children resorted to play, and the defendant, well knowing these facts, carelessly and negligently left said turntable unlocked, uninclosed, or otherwise guarded, wherefore plaintiff sues." The second count of the complaint was as follows: "The plaintiff claims of the defendant the further sum of two thousand dollars as damages, for that heretofore, on, to wit, the 6th day of February, 1898, the defendant owned and kept a turntable at or near its depot in the city of Tuscaloosa, in an open and accessible place, where many children resorted to play, and the defendant, knowing or having reason to believe that children resorted to, or would resort to, its said turntable to play, and that it was a machine or structure dangerous for children to play on, negligently allowed or suffered the said turntable to remain unattended, uninclosed, and unguarded, so that children could easily gain access to and move or turn the same, and on said day the plaintiff, being a child of tender years, of the age of, to wit, 6 years, while playing on said turntable," received the injuries complained of. The third count of the complaint alleged that the defendant, at the time of the accident complained of, owned and kept a turntable near its depot in Tuscaloosa, in an open and accessible place, where children resorted to play, and "the defendant, well knowing that many children resorted there to play on its turntable, that said turntable was a dangerous structure or machine for children, and that several children had been in recent times past dangerously crushed, lacerated, and bruised by playing thereon, nevertheless negligently allowed said turntable to be and remain unfastened, uninclosed, and unguarded, so that children could easily gain access to and play upon and turn the same." This count of the complaint then averred that the plaintiff, being a child of tender years, was injured while playing on said turntable in the manner averred in the other counts of the complaint, and then averred as follows: "That said injury was caused by the negligence of the defendant in leaving said turntable unfastened and unguarded, although it knew that many children resorted there to play upon the same, that it was a dangerous structure or machine for children to play on, and that several children, by reason of playing thereon, had been severely injured and hurt." To each of these counts of the complaint the defendant demurred upon the following grounds: (1) They show that the plaintiff was a trespasser upon the property of the defendant, and failed to allege that the defendant was guilty

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of any wanton negligence or willful injury to the plaintiff; (2) the counts fail to state any cause of action against the defendant. These demurrers were overruled. Thereupon the defendant pleaded three pleas: First, the general issue. In the second plea the defendant set up that the turntable on which the plaintiff was injured was constructed on the land of the defendant, and was used by the defendant as a necessary adjunct to the business carried on as a common carrier; that it did not invite the plaintiff to go upon the turntable, and in fact at the time of the accident did not know that the plaintiff had gone upon it, and that said turntable was properly constructed. The third plea set up substantially the same facts, and then alleged that the plaintiff at the time of receiving the injury was a trespasser, and that said injuries to the plaintiff were not caused by any wanton negligence or willful act on the part of the defendant. To each of the special pleas the plaintiff demurred, setting up in various ways that they did not constitute a defense to the action, and were no answer to the complaint. These demurrers were sustained. The cause was tried upon an agreed state of facts, from which it appeared that plaintiff was six years of age at the time of the injury complained of; that, with a companion or companions, plaintiff had gone upon defendant's land, and was playing with the turntable of the defendant, when the same was moved by a boy with whom plaintiff was playing, and plaintiff was injured thereby to the extent of \$250; that previous to this time two other children had been injured on the same turntable, and this was known to the defendant; that the turntable was not inclosed by a fence, nor was it locked or guarded when plaintiff went thereon; that after the injury to the other children, and prior to plaintiff's injury, the turntable had been locked by the defendant, and several locks had been broken off and stolen, but on the day plaintiff was injured the turntable had been unlocked and used by the defendant, and had not been locked, up to the time of the injury, and was left unguarded. It further appeared that the turntable was used by the defendant as a necessary adjunct to its business as a common carrier; that it was upon its lands, and used by it exclusively in such business; that there were no defects in its construction or maintenance, and the same had been maintained for many years; that it was necessary to use the same constantly during the day, and frequently at night; and that defendant did not invite plaintiff to go upon the land or turntable, and did not, in fact, know at the time that plaintiff was there. It was further shown that the turntable was situated in the midst of tracks within the yard limits of defendant, and that the nearest street or road, and the one upon which plaintiff lived, was 600 feet distant, and that it was necessary, in going from plaintiff's house to the turntable, to cross several tracks, and go into the yards of the defendant. This being substantially all the evidence, the court gave the

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affirmative charge requested by the plaintiff, and denied a similar charge in favor of the defendant. To each of these rulings the defendant separately excepted. From the judgment in favor of plaintiff, defendant appeals, and assigns for error the several rulings of the court above mentioned.

Smith & Weatherly, for appellant.

Foster & Oliver, for appellee.

SHARPE, J. Ownership of property may carry with it the right of the owner to use, and to exclude others from the use of, the property; but, however exclusive may be the owner's rights, he is subject always to the maxim, "*Sic utere tuo ut alienum non lædas.*" Common prudence forbids that one may arrange, even on his own premises, that which he knows, or, in the exercise of common judgment and prudence, ought to know, will naturally attract others into unsuspected danger of great bodily harm. It is the apparent probability of danger, rather than rights of property, that determines the duty and measure of care required of the author of such a contrivance; for ordinarily the duty of avoiding known danger to others may, under some circumstances, operate to require care for persons who may be at the place of danger without right.

The averments of this complaint bring the case within the influence of *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, which is a leading authority in affirmation of the possible liability of railroad companies for negligence in cases of injury to infants trespassing on turntables. As appears from cases cited in briefs of counsel, there has been a parting of the ways of judicial opinion concerning the soundness of the decision in *Stout's Case*. Some courts have repudiated, though numerous others have followed, it. We adopt as sound the doctrine there announced concerning both the duty of railroad companies towards infants, and the mode in which the question of negligence should be tried. On the latter point the court applied in that case the general rule which requires that, though the facts bearing on an issue be undisputed, if different ordinarily constituted minds may reasonably and honestly draw different conclusions from those facts, the question is properly for the jury, and not for the court, to determine.

In this case the trial court ruled properly on the several demurrers to pleadings, and in refusing the charge asked by defendant; but, in giving the charge requested by plaintiff, there was error, for which the judgment must be reversed. The evidence cannot establish, as a legal conclusion, that the turntable, having regard to its structure and situation, was of a kind which, if left unfastened or unguarded, was likely to attract the interference of children, or that the danger was so apparent that the defendant ought, in the exercise of ordinary prudence, to have anticipated that children would resort to the machine and be injured by it if so left. These con-

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clusions were necessary to fix on defendant the charge of negligence made by the complaint. It may be that the jury would have supplied them from the facts proven, but to do so was beyond the court's province.

Reversed and remanded.

THOMASON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit, February 4, 1902.)

[113 Fed. Rep. 80.]

Action for Negligence—Direction of Verdict.

Where, in the opinion of the trial court, the evidence is insufficient to sustain a verdict for plaintiff there is no error in an intimation of an intention to direct a verdict for defendant.

Negligence—Turntable—Pleading—Burden of Proof.*

Where a complaint alleged that plaintiff, while attempting to save his younger brother from being crushed by a turntable on which he was playing, was caught between the track of the turntable and the stationary track, and thus crushed and mangled, and there was no allegation of any special negligence of defendant towards plaintiff, the burden of proof was on plaintiff to show that he was injured while rescuing his brother from imminent danger in which he was placed by defendant's negligence, and that he received such injuries while on the turntable for that purpose only.

Same—Maintenance—Negligence.

The maintenance of railroad turntables is not per se negligence, though the manner of maintaining them may be negligence.

Same—Evidence—Sufficiency.

In an action for injuries sustained by a boy 12 years old, while trying to save his brother from being crushed by a turntable, the sole testimony was that of one witness, who took plaintiff out of the turntable. The testimony was that plaintiff said "he tried to catch the turntable or tried to hold it off his brother, and got fast in there himself." "He said he caught the turntable, and tried to stop it off his brother:" *held*, that direction of a verdict for defendant was proper.

Same—Nonsuit—Judgment for Costs.

Where plaintiff, in an action for personal injuries, takes a nonsuit, a judgment against him for costs is the only judgment it is proper to enter.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

J. H. Merrimon and Locke Craig (P. J. Sinclair, on the brief), for plaintiff in error.

Charles Price, for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

PURNELL, District Judge. Plaintiff in error, a minor 12 years of age, by his next friend, seeks to recover \$30,000 damages for personal injuries received at a turntable maintained

*As to the liability for injuries to children playing on turntables, see *Turess v. New York, S. & W. Ry. Co.* (N. J.), 11 Am. & Eng. R. Cas., N. S., 297, and extensive note, 305; 2 Rap. & Mack's Dig. 744 et seq.

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by the defendant railway company at Old Fort, N. C., and alleges the injury was caused by the negligence of the defendant. The issues arising on the pleadings were three: First, was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Second, did the plaintiff contribute to his injury by his negligence? Third, what damages, if any, is the plaintiff entitled to recover?

After both parties announced they had closed, the trial judge reviewed the testimony, and, upon an intimation of an intention to instruct the jury that the plaintiff was not entitled to recover, the plaintiff took a nonsuit and appealed. This is the practice in North Carolina, and no question is raised in regard to such practice.

Plaintiff excepted to an intimation of the court of an intention to sustain the motion of defendant to direct the jury to return a verdict in favor of the defendant on the first issue, and that the evidence introduced by the plaintiff would not sustain an answer in the affirmative to the issue, was the plaintiff injured by the negligence of the defendant company as alleged? Much of the brief and argument on the hearing is directed to an effort to convince this court that there was error in the intimation of the trial judge that a verdict would be directed. Such course on the part of the court is in accord with the established practice in the courts of the United States. Whatever the rule may be elsewhere, in the courts of the United States, as said by the chief justice in delivering the opinion in *C. A. Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 675, 15 Sup. Ct. 718, 39 L. Ed. 854, "when the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant." To the same effect is the rule laid down in numerous other decisions.

In *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780, quoting *Improvement Co. v. Munson*, 14 Wall. 448, 20 L. Ed. 867, it was held the true principle was: "If the court is satisfied that, conceding all the inferences which the jury can justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." This rule has been followed in *Montclair Tp. v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436; *Railroad Co. v. Woodson*, 134 U. S. 621, 10 Sup. Ct. 628, 33 L. Ed. 1033; *People's Bank of Greenville v. Aetna Ins. Co.*, 20 C. C. A. 630, 74 Fed. 507; *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.*, 85 Fed. 138, 29 C. C. A. 50; *Patton v. Railroad Co.*, 111 Fed. 712, at last term; *Supreme Lodge v. Beck*, 181 U. S. 52, 21 Sup. Ct. 532, 45 L. Ed. 741, and many decisions.

In the case last above cited, the supreme court, quoting from *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, says:

"It is undoubtedly true cases are not to be lightly taken

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from the jury; at the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunities as jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

If, therefore, in the opinion of the trial judge, the evidence was insufficient to sustain a verdict for the plaintiff, there would have been no error if he had directed a verdict. He intimated an intention to do so when plaintiff took a non-suit. Was this error?

The allegations in the complaint are that George, a brother of the plaintiff, five years of age, was playing on the turntable, and had set the same in motion; that said George was about to be crushed by the track of the turntable coming in close proximity to the stationary track; that plaintiff saw the great peril of his brother, and was not near enough to take him off the turntable before he would be crushed or killed; that he attempted to save his brother George, and did save him, by attempting to lessen the motion of the turntable, and in such attempt was caught between the track of the turntable and stationary track, and was thus crushed and mangled and seriously injured. Having made the allegation, the burden was on the plaintiff to furnish proof thereof. Allegation alone will not warrant a verdict. It was incumbent on him to show he was injured by the negligence of the defendant while he was engaged in rescuing his brother from imminent danger, in which he was placed by reason of the negligence of defendant, and he incurred or received such injury while on the dangerous machine for that purpose only.

Plaintiff was over 12 years of age, and, it seems, capable of distinguishing between places of safety and places of danger. The testimony is he was a bright boy, accustomed to being about the trains selling fruit and for other purposes. In North Carolina it seems to have been the rule, recognized by the supreme court, that even infants, capable of so distinguishing between places of danger and those of safety, could not recover damages when they wantonly placed themselves in places of danger, and their acts were the proximate cause of the injury. In *Manly v. Railroad Co.*, 74 N. C. 655, a child 10 years of age fell asleep on a railroad truck, and it was held there could be no recovery; and to the same effect is the decision in the case of *Murray v. Railroad Co.*, 93 N. C. 92, where a boy 8 years of age was injured while riding on the plow of a yard engine. But it is unnecessary to pursue this

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line of decisions in the case at bar. The rule is conceded to turn on the question of intelligence, and applicable more to the second issue, which is not under consideration.

Having made the allegation, the burden was on the plaintiff. There is no allegation of any special negligence on the part of the defendant towards the plaintiff. Turntables are necessary to the operation of railroads. Their maintenance is not per se negligence, though the manner of maintaining them may be. The plaintiff was not introduced as a witness, and the only witness who testified as to how he was injured or why he was on the turntable was a witness named Stepp, who took him out of the turntable. Stepp's testimony was, "Plaintiff said he tried to catch the turntable or tried to hold it off his little brother, and got fast in there himself." "He said he caught the turntable, and tried to stop it off his little half-brother." This was all the testimony as to how he came there and what he was doing there. There is no evidence to show that when he saw his brother in a dangerous position he was away from danger himself. In short, this is all the testimony. Is this sufficient evidence to sustain plaintiff's allegations? to justify a verdict in the affirmative on the issue, was plaintiff injured by the negligence of defendant? The trial judge thought not. This court concurs in that opinion. An affirmative answer to the issue could not be justified on this testimony, but would, of necessity, have been based on conjecture.

Many of the decisions cited in the brief and by plaintiff's counsel assert sound propositions of law, but they are not applicable to this case, because of a difference in the facts. Having taken a nonsuit, the judgment rendered against plaintiff for costs is the only judgment it was proper to enter. Hence there is no force in the exception to the judgment. A careful examination of the record does not disclose any error.

There is no error. Affirmed.

CHICAGO & N. W. RY. CO. v. CITY OF MORRISON.

(*Supreme Court of Illinois, Feb. 21, 1902.*)

[63 N. E. Rep. 96.]

Eminent Domain—Extension of Street over Railroad Right of Way—Inconsistent Uses.*

The strip of land which a city sought to condemn in extending a street crossed a railroad right of way on which were situated five tracks, two platforms, and a portion of a small board building. There was evidence that the building could be moved to another location with little inconvenience, that the platforms could be so changed as to give the same

*See 10 Am. & Eng. Enc. Law (2d Ed.) 1093 et seq.; 4 Rap. & Mack's Dig. 419 et seq.; 18 Cent. Dig., col. 847 et seq.

As to what damages are recoverable where a street is extended across a railroad, see generally, 10 Am. & Eng. Enc. Law (2d Ed.) 1175 et seq.; 3 Rap. & Mack's Dig. 444 et seq.

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amount of space, and that the extension of the street would not decrease the business of the company and no additional men would be required to transact the business. General City and Village Incorporation Act, art. 5, § 1, cl. 89 (Starr & C. Ann. St. p. 710), provides that the city council shall have power by condemnation to extend any street across any railroad track or right of way: *held*, that the fact that the land was already appropriated to a public use did not preclude its condemnation for another public use, unless so inconsistent with the first that both could not coexist, and the question of such inconsistency, under the circumstances, was one of fact.

Same—Necessity—Province of Court.

Where a city council have decided to extend a street across a railroad, the court cannot interfere, on the ground that there is no necessity for such extension, unless an extreme case of oppression or outrage is shown.

Same—Maintenance of Crossing.

In granting the petition of a city for the condemnation of land for a street extension across a railroad, the court may require the railroad company to maintain a crossing and keep gates or flagmen thereat.

Same—Damages—Appeal—Review.

Where, on the condemnation of land for the extension of a street across a railroad, damages are awarded in excess of the cost of the changes which the company would be required to make, and the testimony as to damage from inconvenience and difficulty in handling trains and doing business is conflicting, the award should not be disturbed.

Same—Same—Police Regulations.

Where land for extension of a street across a railroad is condemned, the railroad company is not entitled to damages on account of being compelled to render obedience to police regulations to secure the common welfare.

Appeal from Whiteside county court; H. C. Moore, Judge.

Application by the city of Morrison against the Chicago & Northwestern Railway Company for the condemnation of a street across the railroad. From a judgment granting the condemnation, the railway company appeals. Affirmed.

Barge & Barge (A. W. Pulver, of counsel), for appellant.

P. M. Ludens, City Atty. (L. T. Stocking, of counsel), for appellee.

CARTER, J. This was a condemnation proceeding begun in the county court of Whiteside county by the appellee, the city of Morrison, to ascertain the just compensation to be made for the property taken and damaged by the laying out and opening of Cherry street, of the width of 66 feet, across the railroad tracks, right of way, and lands of the appellant, the Chicago & Northwestern Railway Company. The appellant filed its cross petition for damages to property not taken. The cause was heard before the court without a jury, and judgment was given for appellee, and allowing appellant compensatory damages in the sum of \$238, from which judgment the railroad company has appealed to this court. After the appeal was taken the appellee deposited the amount of the judgment and costs with the clerk of the court, and filed its bond, as required by the order of the court, for the payment of any future compensation which may be awarded, and prayed an order for immediate possession, which was granted.

From this order appellant prayed an appeal, which was not allowed; but it was ordered that said last order be incorporated in the bill of exceptions. The record shows that the appellant made a motion to dismiss the petition on the ground that appellee had no power under the law to condemn the property of appellant for the use of a public street, for the reason that such property was already appropriated to another and different public use inconsistent with the public use of the same as a street. Evidence was introduced in support of the motion; but the motion was overruled by the court, and the defendant excepted. The same question was raised by propositions which appellant requested the court to hold as law in the decision of the case, and which the court refused.

It is contended by appellant that the property sought to be condemned and used for a public street is already devoted by the railroad company to another public use, and that such use cannot coexist with the use as a public street, and that therefore the appellee has no right to condemn the appellant's property for such use; and cases are cited from various other jurisdictions in support of this contention. The mere fact that the use by the public of the land or right of way of a railroad company as a public street crossing would be inconsistent with the particular use to which the company had put it—as, for example, the storing of cars—is not a sufficient reason for denying the right of condemnation to the public for its use as a street crossing. It has been repeatedly held by this court that clause 89 of section 1 of article 5 of the general city and village incorporation act (Starr & C. Ann. St. p. 710) is express authority for the extension of streets, by condemnation or otherwise, by the city authorities over and across the tracks, rights of way, and lands of railroad companies. *Illinois Cent. R. Co. v. City of Chicago*, 138 Ill. 453, 28 N. E. 740; *Chicago & N. W. Ry. Co. v. Same*, 140 Ill. 309, 29 N. E. 1109; *Illinois Cent. R. Co. v. Same*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; *Chicago & N. W. Ry. Co. v. Same*, 151 Ill. 348, 37 N. E. 842. The public and the railroad company would have the right to use the crossing jointly. In the last-named case it was shown that the streets sought to be opened would cross a railroad yard occupied by many railroad tracks, used for storing cars; but the court said that "they were each 'railroad tracks,' and it cannot be important to what particular use the railroad tracks may be devoted." It was held that the deprivation of such use for storing cars was an element in the estimation of damages, but not a reason for denying the right of condemnation, although the continued use of the land for such purpose would necessarily be inconsistent with its use by the public as a public crossing, and the two uses could not coexist. *Chicago & A. R. Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485.

In the present case the railroad lands taken by the city for street purposes are crossed by five railroad tracks. There

are two platforms extending across the proposed street,—one on the north side of the tracks, about 8 feet wide, made partly of concrete and partly of plank, and one on the south side, of varying width, constructed of brick and plank,—and both used for the accommodation of passengers in connection with the passenger house, which is south of the tracks and west of the Cherry street extension. There also extends into this street about 5 feet of a cheap building, 10 by 18 feet and 8 feet high, made of boards and cleated up, with no interior finish, known as an “oil house,” and used for the storage of lamps, oil, etc. The testimony of appellant’s witnesses showed that this oil house could be located at another place with but little inconvenience to the company and that its removal would not be a serious matter; that the platforms would have to be enlarged on the east end to give about the same platform space as there is at present; that the extension of Cherry street would not decrease the business of the company; and that it could do the same amount of business, both freight and traffic, without the employment of more men. In *Illinois Cent. R. Co. v. Town of Normal*, 175 Ill. 562, 51 N. E. 781, the proposed street across the railroad company’s right of way cut in two a car house or outhouse, and necessitated the removal of a section house that stood in the street sought to be opened; and it was there contended that the property had already been appropriated to a public use, and was exempt from condemnation, but the contention was not sustained. It is a question of fact whether the laying out and opening of a public street across the tracks and grounds of a railroad company would so materially interfere with the proper and necessary use of the same by the company as to be inconsistent with it, so that both uses could not coexist. *Winona & St. P. Ry. Co. v. City of Watertown*, 4 S. D. 323, 56 N. W. 1077. As has been shown above by the evidence, the railroad company would be put to some inconvenience by the opening of Cherry street across its tracks, and would have to rebuild part of its platforms and remove its oil house, but would suffer no diminution in its business, nor would any additional force of men be necessary. For such damages a money compensation could be awarded. We do not find any other inconvenience arising to the appellant, beyond that necessarily attendant upon the opening of a street across its railroad tracks. The rulings of the court below on the motion to dismiss and the propositions of law were correct.

It is further contended that there is no evidence showing any necessity for the extension of this street. In *Chicago & N. W. Ry. Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. 574, we said (page 658, 154 Ill., and page 575, 39 N. E.): “The location of new streets or the extension of old streets is a matter committed by the legislature of the state to the local authorities of the town. It could only be an extreme case of oppression or outrage that would justify interference by the

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court.” And in *Chicago & A. R. Co. v. City of Pontiac*, supra, we said (page 164, 169 Ill., page 487, 48 N. E.): “Unless there has been an abuse of power on the part of the city council in passing an ordinance for local improvements, the courts are powerless to interfere.” No abuse or oppression has been shown in this case.

It is next contended that the court erred in refusing to hold as law appellant's propositions that appellee could not compel it to build, construct, or maintain a crossing over its tracks, or keep gates or flagmen at said crossing, and that it had a right to compensation for doing these things. This same contention was raised by the appellant in *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, and after full consideration of the authorities it was not sustained. See, also, *Lake Shore & M. S. Ry. Co. v. City of Chicago*, 148 Ill. 509, 37 N. E. 88; *Chicago, B. & Q. R. Co. v. Same*, 149 Ill. 457, 37 N. E. 78; *Chicago & A. R. Co. v. City of Pontiac*, supra.

It is further contended that the damages allowed were inadequate. By the testimony of appellant's own witnesses it was shown that the cost of extending the platforms, removing the oil house, and moving a frog which would have to be moved, would not exceed \$215. The court awarded \$238 damages. The evidence as to the damages sustained by the company by reason of the inconvenience and increased difficulty of handling its trains and business on account of the opening of the street was conflicting. No more men would be required, and its business would suffer no loss. No damages could be allowed appellant on account of being compelled to render obedience to police regulations to secure the common welfare. See cases above cited. The court, sitting as a jury, heard the evidence, saw the witnesses, and weighed their conflicting statements, and the amount allowed is not palpably against the weight of the evidence. No error appearing, the judgment must be affirmed.

Judgment affirmed.

BROWN et al. v. CHICAGO, R. I. & P. R. Co.

(*Supreme Court of Nebraska, Feb. 19, 1902.*)

[89 N. W. Rep. 405.]

Eminent Domain—Compensation—Deposit with County Judge.

The deposit of money by a railway company with a county judge, during the progress of proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or damaged.

Same—Same.

One whose property has been taken by a railway company for a right of way by statutory proceedings for that purpose may, after the proceedings have terminated, recover the amount awarded to him by an action at law against the company, and he is not bound to resort to the fund

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deposited with the county judge during the proceedings, as required by statute.

Same—Estoppel.*

A railway company, after having prosecuted proceedings to obtain a right of way to a final determination, is estopped to repudiate or abandon them, and is bound to pay the amount of the award to the landowner. (Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Lancaster county; Tuttle, Judge.

Action by Ruth Brown and others against the Chicago, Rock Island & Pacific Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Benjamin F. Johnson, for plaintiffs in error.

Billingsley & Green, for defendant in error.

AMES, C. In 1892 the defendant in error began proceedings in the county court for Lancaster county for the acquisition, in the usual manner, of a right of way for railroad purposes over and upon certain lots in the city of Lincoln, a part of which were owned by the plaintiffs in error, and a part by one Westerfield. Commissioners appointed for the purpose assessed the total damages to these lots at \$1,700, and this amount of money was thereupon deposited by the company with the county judge. Upon an appeal to the district court this award was for some reason set aside, and afterwards, under a new commission issuing from the county court, damages were assessed at \$950. The property owners and the company then agreed to refrain from the further prosecution of the proceedings, and in consideration thereof it was stipulated that the compensation to be paid to the former should be \$1,200, or, as the pleadings phrase it, the award should be increased to that sum, one-half thereof to be paid to Westerfield, and the other half to the plaintiffs in error. The money deposited by the company at the time of the first appraisal was permitted by it to be retained by the county judge, and was directed by it to be applied, as far as requisite, to the satisfaction of such claims for damages as should finally be established in the behalf of the property owners. Soon after the making of the agreement Westerfield was, with the consent of the company, permitted to withdraw \$600 from the fund; but it was further stipulated between the latter and the plaintiffs in error that their part of the sum agreed upon should not be withdrawn until they should convey to the company, by sufficient warranty deeds, the fee title to that part of the lots belonging to them. It is alleged by the company and denied by the plaintiffs in error that it was an expressed part of the agreement that the property owners should look to the funds in the hands of the county judge for their money, but none of the stipulations is in writing, and there is no evidence upon the point in the record. With this exception, however, there

*See generally, 7 Enc. Pl. & Pr. 673 et seq.; 18 Cent. Dig., col. 1784 et seq.; 4 Rap. & Mack's Dig. 818 et seq.

is no dispute as to what occurred between the parties, and we think the fair interpretation of the pleadings and circumstances is that both of them understood that the amount of the award, \$950, and an additional \$250, making a total of \$1,200, should remain in the hands of the judge, in the character of a statutory deposit, until withdrawn by the parties entitled to it by the terms of the compromise. Westerfield, as already noted, withdrew his money speedily, but there was some delay on the part of the plaintiffs in error because there was some difficulty about their title which needed to be settled by a decree of court before they could make satisfactory deeds of warranty conveying their land. This difficulty was finally overcome, and the required deeds were executed and delivered, and a demand was made upon the company to pay \$600 to the plaintiffs in error in consideration of the premises. Payment was refused, and this action was brought to recover the sum demanded. It is admitted that neither party has withdrawn the money from the county judge or his successor in office, or made any attempt or request to do so. The trial judge was of the opinion that upon this state of facts the plaintiffs were not entitled to recover, and instructed the jury to return a verdict for the defendant, and thus is presented the only question in the case.

We are of the opinion that the district court erred. The constitution of this state provides (section 21, art. 1): "The property of no person shall be taken or damaged for public use without just compensation therefor." The language of this section is imperative, and the right of the property owners to compensation is unqualified. This right cannot be impaired or modified by legislation or otherwise. He is not compensated until the sum to which he is entitled is paid or tendered to him or to some one authorized by him to receive it. It is not competent for either the legislature or the courts to appoint some person without his consent, and to say that payment of deposit with such appointee shall be equivalent to payment to him. If the statute expressly so provides, or was susceptible of that construction, it would be unconstitutional and void. In our opinion such is not its meaning, although it goes to the furthest limit permissible. The money, after the assessment has been made, is deposited with the county judge, not as payment, but as security that payment shall be made; and no act of the railway company, or of the court, or of any other person other than the property owner, can convert it into a payment, or relieve the corporation of its obligation, not to secure, but actually to make, just compensation for the property taken or damaged. The property owner may, if he chooses, waive his privilege, and apply for and receive the sum awarded and deposited, and by so doing he, of course, relieves both the company and the judge of all further or other responsibility; but he may also, if he prefers, stand upon his constitutional right, and demand that the sum awarded be

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paid to him, or to an agent of his own choosing. Neither during the pendency of the proceedings nor after they have ended can he be compelled to resort for the satisfaction of his demands to the uncertain security of official responsibility, nor to incur the risk of official delinquency. He cannot be charged with the negligence or shortcomings of an agent in whose appointment he did not concur, nor can he be accused of negligence because of failure to demand of a third person a sum of money which his adversary is under obligation to pay himself. The proceeding is instituted at the instance and for the benefit of the railway company, and the deposit is permitted to be made solely for its convenience. Having made it, the company obtains a license to enter upon the land, but does not accomplish the taking of the property, or acquire an easement therein, until it has satisfied the constitutional requirement, and made compensation therefor to the person owning the same. Commenting upon similar constitutional and statutory enactments, the supreme court of Iowa in *White v. Railway Co.*, 64 Iowa, 281, 20 N. W. 436, say: "These provisions are in harmony with the constitution. The payment of the money to the sheriff cannot be regarded as a payment to the landowner. Section 1244 provides that the amount of damages shall be paid to the sheriff 'for the use' of the owner of the land. This evidently means nothing more than that it shall be paid by the sheriff, at the proper time, to the owner. The sheriff cannot be regarded as the agent of the owner, but rather as the agent of the railway company, which invoked his services by instituting the proceedings. The money cannot be regarded as having been paid into court, and therefore in the custody of the law. But, if this be not so, the payment to the sheriff is not payment to the landowner. If through the unfaithfulness or mistake of the sheriff, or the failure to pursue the directions of the statute, the money should be lost, and not reach the hands of the landowner, the loss ought not to fall upon him, but rather upon the railway company, which was the mover in the proceedings, and received the benefits flowing from them. *Blackshire v. Railroad Co.*, 13 Kan. 514."

There is evidence in the record that the county judge with whom the deposit was made failed to account for the money or to pay it over to his successor in office, and, continuing in default, had departed from the state; but we have omitted to comment upon this fact, because, in our opinion, it is immaterial. The undisputed facts are that at about the time of the making of the award the defendant entered into possession of the property, and has since enjoyed an easement in it for railroad purposes, and that the plaintiffs in error have not been compensated therefor. But actual possession by the railway company is not essential to the plaintiffs' right of recovery. The former, after having prosecuted the proceedings to a final determination, is estopped to repudiate or

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abandon them, and is bound to pay the amount of the award to the landowner. *Drath v. Railroad Co.*, 15 Neb. 367, 18 N. W. 717. Upon that state of facts, the plaintiffs, not the defendant, were entitled to recover, and the instruction complained of was erroneous.

It is recommended that the judgment of the district court be reversed and a new trial granted.

ALBERT and DUFFIE, CC., concur.

PER CURIAM. For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

ERIE R. CO. v. STEWARD *et al.*

(*Court of Appeals of New York, March 7, 1902.*)

[63 N. E. Rep. 118.]

Eminent Domain—Right to Take Land for Railroad Purposes.*

A railroad company can take land for railroad purposes only where a necessity exists which is recognized by statute, and provided for therein; and, when a railroad company claims such right, it must make out a case within the statute.

Same—Same—Reorganization—Exhaustion of Power of Predecessor.

Where a railroad company is organized, under Laws 1892, c. 688, § 3, as successor by reorganization of a railroad company created by special act, and such original company has exercised all the power of eminent domain given it by its charter, such power is exhausted; and the reorganized company cannot change the route of the railroad, and acquire land by condemnation for purposes of such change, unless the power to condemn such land has been conferred upon it by a subsequent statute.

Same—Same—Change of Route.

Railroad Law (Laws 1892, c. 565) § 4, subd. 2; *Id.* § 7, subds. 3, 4,—giving power to condemn land necessary for the construction, operation, and maintenance of its railroad, do not authorize a railroad corporation having a completed road through an incorporated village to condemn land for a new and straighter line through such village, to be used as a short cut and an additional main line.

Same—Same—Same.

Under Railroad Law (Laws 1892, c. 565) § 13, relating to alteration or change of any part of the route of a railroad through an incorporated village, and providing that no alteration shall be made, unless approved by the two-thirds vote of the trustees of the village, such a change cannot be made unless such approval is first obtained.

Appeal from supreme court, appellate division, Second department.

Condemnation proceedings by the Erie Railroad Company against Mary A. Steward and others. From an order of the appellate division (70 N. Y. Supp. 698) reversing a judgment in favor of plaintiff, and granting a new trial, plaintiff appeals. Affirmed.

*See generally, *Shreveport, etc., Ry. Co. v. Hinds* (La.), 13 Am. & Eng. R. Cas., N. S., 325, and note, 335; 18 Cent. Dig., col. 896 et seq.; 10 Am. & Eng. Enc. Law (2d Ed.) 1050 et seq.; 4 Rap. & Mack's Dig. 383 et seq.

Charles F. Brown, Henry Bacon, and Joseph Merritt, for appellant.

Howard A. Taylor and Origen S. Seymour, for respondents.

GRAY, J. In this proceeding the Erie Railroad Company seeks to acquire certain lands in the town of Goshen, against the will of the defendants, their owners, upon the allegation that they are necessary for the purpose of laying two additional main tracks from a point westerly of the village of Goshen to a point easterly of the said village, and upon a different alignment from that upon which its present main tracks are laid. The application was opposed by the owners who denied the allegations of the petition relating to the necessity for the lands, or to their being required for a public use. Upon the report of the referee before whom the trial of the issues was had, a judgment was entered in favor of the plaintiff, which authorizes it to take the property in question, upon making such compensation therefor as should be ascertained by commissioners of appraisal therein appointed for that purpose. Upon the defendants' appeal to the appellate division, in the Second department, the judgment recovered by the plaintiff was reversed upon the questions of fact and of law in the case, and a new trial was ordered. From this order the plaintiff appeals to this court, and, as we consider that there is no controverted fact in this case upon which the decision of the one question of law depends, we have determined to entertain the appeal. There is no conflict in the evidence as to the plaintiff's need of an increase in its main-track accommodations. There is a dispute as to the relative cost of meeting the plaintiff's needs by the widening and regulating of the embankment upon which the present main tracks are laid, and of building the additional tracks in the way proposed; but that is not at all material with reference to the question of power involved in the application of the plaintiff. Upon the undisputed facts the plaintiff requires, and is conceded to be entitled to have, more land for additional tracks; and the sole question of law arises, unaffected by what dispute there may be in the evidence as to the best way for the plaintiff to accomplish its ends, whether it is empowered by law to construct the two additional main tracks, as proposed, over the defendants' lands, without their consent. There are no questions of fact, to be resettled upon a new trial of the case, which affect the question of law involved, and therefore the terms of the reversal by the appellate division do not deprive us of the right to entertain this appeal.

The situation of the plaintiff's railroad, in the town of Goshen, is that it enters and leaves the village of Goshen upon a long and irregular curve, of somewhat more than three miles in length. The grade at that point is undulating,—varies considerably,—and auxiliary engines, called "pushers," have to be maintained to haul trains over the distance, at a

great expense to the company. In order to obviate this expenditure, and to have two additional tracks as a part of the main line, upon which the freight trains of the road could be moved with greater facility and convenience, the plaintiff filed a map, and laid out a new line or route, of something less than three miles in length, over the lands of the defendants and of others, which began at a point on its present main line west of the village of Goshen, and proceeded, in very nearly a straight line, to a point upon the main line east of the village. The plan thus proposes the retention of the present main line, and the construction and operation of a new line, with two tracks, and the plaintiff will traverse the village of Goshen with two lines of railroad. The line, as it exists, was constructed by the New York & Erie Railroad Company, which was organized by a special act of the legislature in 1832 (chapter 224, Laws 1832), and its franchises and privileges have descended to and are vested in the plaintiff. It is now the purpose of the plaintiff to construct two additional tracks upon its entire Eastern or New York division, in order that, with a completed system of four tracks, its operations may be better and more economically conducted, and the new line or route now planned through Goshen is intended to form part of that system. Its right to do this, and to exercise the power of eminent domain in the taking of land for the accomplishment of its purpose, depends upon the existence of any legislative authorization to that effect. This question is one which the defendants are entitled to raise in objection to the application of the plaintiff. They have the right to require the plaintiff to point out where the power of eminent domain is conferred upon it, through the exercise of which their lands are to be condemned. To justify the taking of land, in invitum its owner, for railroad purposes, not only the necessity must exist, but that necessity must be recognized by statute, and be provided for in some plain grant of power. That a railroad purpose usually subserves a public use, is true; but the precise authority to take the land desired, by condemnation proceedings, must always be found, and whether it exists and whether it is available in the case presented are questions for judicial determination. The courts are to decide whether the uses for which the land is demanded are in fact public, and within the intendment of the statute. The delegation by the legislature of its power of eminent domain to railroad corporations is justified, as a constitutional measure, upon the ground that their franchises are for a public use, and that in accommodating the public, by furnishing transportation for passengers and freight, they perform a public duty, and are invested with a quasi public character. *Railroad Co. v. Brainard*, 9 N. Y. 100; *Railroad Co. v. Davis*, 43 N. Y. 137. But when the right to exercise the power is claimed, the corporation must make out a case within the statutory delegation.

The plaintiff is the successor of the New York & Erie Rail-

road Company through intermediate reorganizations. Upon its organization, in 1895, under the third section of the stock corporation law (Laws 1892, c. 688), it acquired all the rights, franchises, and privileges which were possessed and enjoyed by its immediate predecessor, the New York, Lake Erie & Western Railroad Company, upon whom had devolved by law those of the Erie Railway Company, which in turn had been invested with those of the New York & Erie Railroad Company by chapter 160 of the Laws of 1860. Thus the powers possessed by the plaintiff are those of the original company, as the same may have been amplified, added to, or affected by subsequent legislation. The general railroad act of 1850 applied to the New York & Erie Railroad Company, as the present railroad law of 1892 applies to the plaintiff in its grant of powers. No power to change the plaintiff's line or route can be found in or inferred from the provisions of the original charter for the railroad. The charter of the New York & Erie Railroad Company, by the fourth section, required the directors, after their examinations and surveys had been completed for a railroad from the city of New York to Lake Erie, to designate the line of its road, and provided that "the line, course, or way, so selected and certified, shall be deemed the line, course, or way on which the said corporation shall construct, erect and build," etc. By sections 9 and 11 the corporation was empowered to acquire land for accomplishing the objects of its incorporation, and the construction of a "single, double or treble railroad or way * * * on the line, course, or way designated by the directors, as aforesaid, as the line, course and way whereon to construct, erect, build and make the same." When the company had located its line of road between its terminal points, pursuant to the requirement of its charter, it was concluded by that location; and no change of its route could thereafter be made, in the absence of legislative authority. The effect of the designation by the directors of the line of the road was the same as if the line had been described in the charter, and the operation by the corporation of a railway limited thereto. *Hudson & D. Canal Co. v. New York & E. R. Co.*, 9 Paige, 323, 328; *Mason v. Railroad Co.*, 35 Barb. 373, 381; *In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601; *Wood*, R. R. § 271. It was with reference to the construction of the line or way as and when designated by the directors that the power of eminent domain was delegated to the corporation, to be exercised in the acquisition of private lands, and that power, once exercised, was necessarily exhausted. The power to change the route of a railroad was first conferred on railroad corporations by chapter 404 of the Laws of 1847, and related to cases where the railroad had not been constructed. In the general railroad act of 1850, and in other acts passed between that time and the enactment of the present railroad law, provision was made for the relief of railroad corporations, under

conditions specified therein, in cases where an alteration of the route or a new line was desired.

The plaintiff relies upon certain of the provisions of the railroad law as enabling it to take private land for the accomplishment of its present purpose. The first of the provisions which are referred to is contained in subdivision 2 of section 4 of the railroad law, and confers the power "to take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction and maintenance in the manner provided by law," etc. The section had provided that, "subject to the limitations and requirements of this chapter, every railroad corporation, in addition to the powers given by the general stock and corporation laws, shall have power" as specified in nine subdivisions, which, by a regular procession of ideas, cover the needs of a corporation organized for the operation of a railroad,—from a power to survey lands as an initial step, down through powers necessary for or relating to the construction of the road, under varying circumstances, the construction of buildings and matters of transportation, to a power to hold land in any other state, or stock in any foreign corporation owning lands in another state. This was an enumeration of the general powers which railroad corporations would possess, and which might be exercised, within the limitations of the chapter. The power to acquire by condemnation real estate necessary for "construction and maintenance" had been already exercised under the original charter of the New York & Erie Railroad Company. When it is sought to exercise the power given by subdivision 2 for an especial purpose, not among those generally enumerated in the section, the applicant must show that it is necessarily and clearly comprehended within one or the other of them. That a change of a part of the route, by a diversion of the tracks of a main line over a "short cut" across another part of the village, is within the general powers conferred upon the corporation, I do not believe. The statutory power of eminent domain is not to be extended by inference or implication. *Railroad Co. v. Davis*, *supra*.

The plaintiff claims that the power may be found in subdivision 3 of section 7 of the railroad law, which reads: "Where it shall require any further rights to lands or the use of lands for switches, turnouts, or for filling any structures of its road, or for constructing, widening or completing any of its embankments or roadbeds, by means of which greater safety or permanency may be secured, and such lands shall be contiguous to such railroad and reasonably accessible to the place where the same are to be used for such purpose or purposes." This language, read with its ordinary significance, and with regard to the subject-matter, fails to suggest the idea of so

broad a power being conferred. There is not a fact found, nor is there any evidence, showing that the purpose of the plaintiff is to build what is commonly understood as a "switch" or a "turnout," merely. Undoubtedly the new line or way planned over the defendants' land would have to be connected with the main line by a "switch," and perhaps a "turnout," and that is all that relates to them. Within the allegations and the testimony, the land was not required for a switch or turnout. It was wanted for the projection of its main line over a new and straighter way. The allegation of the petition is that plaintiff has laid out upon the map filed by it "a route for the two additional main tracks to be used for the purposes of its incorporation, and to accommodate its business, * * * upon a different alignment from that followed by its present main tracks," etc. The finding of the referee is to the same effect, and the testimony of the chief engineer of the plaintiff was that "the intention of the Erie Railroad Company is to build only two additional tracks upon the changed alignment, and to retain on the existing main tracks the two that are there. * * * There will exist through the village one main road on two different lines." Nor is the land of the defendants contiguous to the railroad of the plaintiff, as the section contemplates. That the plaintiff may have acquired land extending from its road, on either end of the curve, so as to touch the defendants' land, does not make it contiguous to the railroad. The contiguity intended by the section more reasonably means that the land sought to be taken is adjacent to the railroad itself. Whether this may be a sufficient ground of objection, by itself, or not, it is of some importance in the construction of the statute. It is argued that the words in the middle of subdivision 4 of section 7, "or for any other purposes necessary for the operation of such railroad," are available to the plaintiff, as conferring authority to take land for the construction of additional tracks, whether switch tracks or main tracks. This subdivision relates to the acquisition of real property, where the corporation "shall require any further right to lands, or to the use of lands for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, or for any other purpose necessary for the operation of such railroad, or for any right to take and convey water from any spring * * * to such railroad, for the uses and purposes thereof, together with the right to build, or lay aqueducts or pipes for the purpose of conveying such water," etc. The maxim, "*Noscitur a sociis*," applies, and limits the general meaning of the words found and relied upon in the clause. From the context, the main object seems to be to provide for the cases where the corporation requires the use of lands for the flowage of waters, or for their conveyance for railroad uses or protection. If a more general meaning could properly or reasonably attach to them, it would relate to what was necessary for the operation of the

railroad; that is, the railroad as it was located and built under its charter. It would be contrary to reason to extend their reference to such railroad project, additional to the existing railroads, as the corporation might deem advantageous.

It is argued that section 13 of the railroad law affords authority. The provisions of this section relate to an alteration or a change of the route, or any part of the route, of the road of a railroad corporation, or of its termini, and prescribe the conditions and limitations, under which such change may be made. It is expressly provided that "no alteration of the route of any railroad after its construction shall be made, or new line or route of road laid out or established, as provided in this section, in any city or village unless approved by a vote of two-thirds of the common council of the city or trustees of the village." In this case the approval of the village trustees has not been obtained to the plan proposed by the plaintiff's directors. While insisting that an alteration or change of route is not necessarily involved, the plaintiff says that the statutory provision is applicable, and that it may proceed without being obliged to first secure the approval of the village trustees. In this construction I am unable to agree. The language of the statute is mandatory, that "no alteration of the route * * * shall be made * * * unless approved," etc. That is very different from the case cited, of *In re New York Cent. & H. A. R. Co.*, 77 N. Y. 248. That was a proceeding under the act of 1850 to acquire real estate, under sections 13 and 14, adjoining its railway, for tracks, switches, and sidings for freight facilities; and subdivision 5 of section 28 provided that nothing in the act should be construed as authorizing the construction of any railroad in the streets of a city without its assent. The decision was that the general authority of the statute under which the railroad company was seeking to acquire the tract of land in question should not be deemed to extend to a use of the city streets for a railroad, unless the assent of the city was obtained. See *In re Rochester Electric Ry. Co.*, 123 N. Y. 351-360, 25 N. E. 381. The plain and express purpose of this section was to empower the railroad company to alter or to change any part of its route; that is, to substitute another route, in whole or in part, for the existing one. It would be unjust to the landowner to hold that the corporation could proceed under that section, and burden his title with a proceeding to take his land for a new line or route through the village without showing compliance with a condition without which the plan would be abortive. *In re Rochester Electric Ry. Co.*, 123 N. Y. 361, 25 N. E. 381. It seems from these considerations that, if the plaintiff proposes to change or alter that part of the route of its road in Goshen, it is not yet in a position to do so, while the assent of the village trustees is withheld. If its purpose is not that, then the statutory provision is inapplicable to the case.

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I find in none of the provisions referred to, of the railroad law, a delegation of the power to condemn the defendants' land for the purpose set forth and proven, except it be in section 13, and a strict compliance with its provisions is essential to the valid exercise of the power. While a statute which authorizes the taking of private property in invitum the owner should be strictly construed, as being in derogation of the common-law rights of ownership, I concede that the construction should not be overtechnical, and that this case is one where the project may be of advantage to the public traffic, and of benefit to the railroad corporation. But however the facts may appeal to us, in my opinion there would be no justification in law for our holding that the plaintiff is entitled by the statutes of this state to execute its present purpose. It may enlarge and improve its track accommodations upon its present line of road within the provisions of the statute; but, to do what is now proposed, it lacks legislative authority, unless proceeding under section 13, with the approval of the village trustees. If that approval be secured, the plaintiff will then be in a position to execute its proposed plan of the new line through Goshen, and consequently to take the necessary land for that purpose by right of eminent domain.

In connection with the forcible reasoning of Mr. Justice Jenks, speaking for the appellate division, enough has been said to show that the plaintiff was not entitled to a decree condemning the defendants' lands, and therefore I advise an affirmance of the judgment and order appealed from, and that judgment absolute be entered on the stipulation, dismissing the proceeding, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Ordered accordingly. _____

PEABODY v. BOSTON & P. R. CORP.

(*Supreme Judicial Court of Massachusetts, Suffolk, March 3, 1902.*)

[67 N. E. Rep. 1047.]

Stations and Depots—Construction of Approaches—Application of Statute.

St. 1896, c. 516, authorizing a union station in Boston, provides (section 20) that the board of street commissioners of the city shall lay out, and the city shall construct, suitable approaches thereto, in such directions and at such grades as the board shall deem public convenience and necessity require, and as the mayor shall approve: *held* to apply to the reconstruction of streets already laid out in order to make suitable approaches, and not to apply solely to the laying out of new streets for such purpose.

Remedy of Abutter Where Railroad Exceeds Its Powers of Condemnation.*

Where a railroad company exceeds its powers of condemnation in

*As to what are the remedies of an abutting owner, see 7 Rap. & Mack's Dig. 628 et seq.

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changing the grade of a street, the remedy for the injury to an abutting lot owner is by an action of tort, and the company is not estopped by its own wrong to set up that defense if a petition for compensation is brought against it.

Report from superior court, Suffolk county; John H. Hardy, Judge.

Petition by Philip G. Peabody against the Boston & Providence Railroad Corporation. On report from the superior court. New trial granted.

F. T. Benner and Sumner H. Foster, for plaintiff.
J. H. Benton, Jr., for defendant.

LORING, J. This is a petition for compensation for damages caused to the plaintiff by the change in grade of Buckingham street in front of the petitioner's house and land abutting on the southerly side of that street. The petition is brought against the defendant railroad on the ground that by force of the plans prepared by it and approved by the mayor of the city of Boston and the railroad commissioners, it acquired the right, under St. 1896, c. 516, to make the change in grade which it made, and, if not, that it is estopped to set up its own wrong. We are of opinion that the petitioner has mistaken his remedy, and that he should have brought an action of tort.

(Question of municipal law omitted.)

The defendant's contention before us is that it had no authority to change the grade in Buckingham street; that the approaches which, by section 19, it was to construct, were the approaches on its own land, and shown on the plans prepared by it, and approved by the mayor of Boston and by the board of railroad commissioners; that the approach to the station by way of public streets was covered by section 20, and that those approaches were to be constructed by the city of Boston "at such grades as said board [of street commissioners of the city of Boston] shall deem the public convenience and necessity require, and as the mayor of said city shall approve." There is no statement in the report explaining why the proposed extension of Clarendon street was not constructed, or why the railroad did not construct an approach to the easterly entrance of its station over the land which was to be covered by the extension of Clarendon street, and which had, after the plan for its station was approved, and before the approach over Buckingham street was constructed, been taken by it in fee; or how it happened that the defendant railroad corporation undertook and was allowed not only to raise the grade of Buckingham street, which was a public way, but also to enlarge it by adding 20 feet to its width. On the report it must be taken that this was done by the defendant without further authority, and it now contends that in doing it it was a trespasser, and we are of opinion on the facts stated in the report that it was. The petitioner's answer to the defend-

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ant's contention that the approaches on its own land were to be made by and at the expense of the defendant, and those by way of public streets were to be constructed by the city under section 20, is that that section applies to the laying out of new streets, and not to reconstructing streets already laid out in order to make them suitable as approaches to the new station. But we think that that is too narrow a construction of the section. The provision of section 20 is not that the street commissioners shall lay out such new streets as are necessary, but it is that they shall "lay out" "suitable approaches." We are of opinion that the words "lay out" in this connection are not used in their technical sense of laying out a way, but in the more general sense of making it the duty of the street commissioners to prescribe any changes that might be necessary in the public streets to connect the private property of the defendant railroad with the streets of Boston, including what would ordinarily be done by laying out a new way, or altering, relocating, or directing specific repairs upon an existing way. The language of the section is loose, but it is not to be lightly presumed that the legislature intended to give to a railroad a roving commission to change the grades of the public streets without the sanction of any public authorities; and this construction is confirmed by the fact that section 19 provides that the approaches shown on the defendant's plan shall be constructed by them; that is to say, approaches on its own land are to be made by the railroad, and approaches by way of public streets are to be left to the control of the street commissioners of the city, and to be constructed at their expense. In this case the defendant presented a plan showing as an approach a proposed street called on the plan "Clarendon Street Extension," so that on the plan which was approved no approach to be constructed by it under section 19 was shown.

The petitioner's second answer to this contention is that the defendant is estopped to set up its own wrong, and the case of *Parker v. Railroad Co.*, 3 Cush. 107, 50 Am. Dec. 709, is relied upon as an authority to that effect. The decision in that case was put upon the ground that the railroad had a right to construct the approaches to the overhead bridge under the statutes then in force, after notice to the selectmen of their intention so to do, not objected to by them. It is settled that, where a corporation has the right to condemn property, and proceeds as if it had condemned it, it is estopped to set up in a petition for compensation that it has not complied with the formalities prescribed for a technical taking. *Lewis v. City of Boston*, 130 Mass. 339; *Spaulding v. Inhabitants of Arlington*, 126 Mass. 492, 494; *Lexington Print Works v. Inhabitants of Canton*, 171 Mass. 414, 415, 50 N. E. 931; *Gloucester Water Supply Co. v. City of Gloucester* (June, 1901) 60 N. E. 977. But where the act done by the defendant for which compensation is sought is outside of the acts which the defendant

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can entitle himself to do by any act of condemnation, the plaintiff's remedy is by an action of tort, and the defendant is not estopped to set up that defense if a petition for compensation is brought against him. We are of opinion that the jury should have been instructed that upon the whole evidence the plaintiff could not recover.

Although this case comes here by report, we think that the entry should be: New trial granted.

DIAMOND JO LINE STEAMERS *et al.* *v.* DAVENPORT, R. I.
& N. W. Ry. Co. *et al.*

(*Supreme Court of Iowa, Jan. 31, 1902.*)

[88 N. W. Rep. 959.]

Measure of Damages—Instructions.*

In condemnation proceedings, an instruction that the measure of damages was the difference between the value of the premises before and after the construction of the railroad was not erroneous because too terse and brief, where the court also charged that the jury should consider the obstruction to the use of the property, and that, if the property was especially available, by reason of its location, to the uses to which it was being and had been put, this fact should be considered.

Evidence—Irrresponsive Answer.

A party cannot complain of an irresponsive answer to a question not asked by him.

Appeal from district court, Scott county; Jas. W. Bollinger, Judge.

An appeal from the award of damages in condemnation proceedings. Affirmed.

Henderson, Hurd, Lenehan & Kiesel, for appellants.

Davison & Lane, for appellees.

SHERWIN, J. The court instructed that the measure of the damages the plaintiffs had sustained was the difference between the value of the premises before and after the construction of the defendants' railroad thereon. That the rule so given is correct is practically conceded by the appellants in argument, but they contend that the instruction which announced it was too terse and brief, and that one asked by them should have been given. In this we do not concur, for in its seventh instruction the court told the jury that it was authorized to consider the obstruction to the use of the property by the plaintiffs, and said: "If the property is especially available, by reason of its location, to the particular uses to which it is and has been put, this is proper to be considered in determining the valuation to be given it." The jury undoubtedly knew the uses to which the plaintiffs had put the property in the past and were then putting it, and

*See 10 Am. & Eng. Enc. Law (2d Ed.) 1150 et seq.; 4 Rap. & Mack's Dig. 663 et seq.; 18 Cent. Dig., col. 1211 et seq.

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this instruction specifically called its attention to the special availability of the property for those purposes by reason of its location. This was certainly sufficient, in the absence of any evidence tending to show its adaptability to other uses than those to which it was then put by the plaintiffs, and, we think, fully covered the plaintiffs' request. There is no evidence to support the instruction asked on the point that there was no other place along the river front at Davenport where the plaintiff could have unobstructed access to the river from its offices and warehouses. Instruction 4 claimed to have been asked by the plaintiffs is denied by the appellees, and we cannot consider it. The same situation exists as to the testimony relating to the condemnation of one of the plaintiffs' buildings by the city council. The testimony of the witness Bettendorf appears to have been material and competent. So far as we can determine from the brief record before us, it related to the question of the plaintiffs' damages by reason of the laying of the tracks in question, and we cannot say whether it was responsive to the question asked or not, for the question is not before us; but, even if it were, the plaintiffs cannot complain of an irresponsive answer to a question not asked by it. We find no prejudicial error in the record, and the judgment is affirmed.

SHUGARD v. UNION TRACTION CO.

(*Supreme Court of Pennsylvania, Feb. 24, 1902.*)

[51 Atl. Rep. 325.]

Injury to Employee—Negligence of Fellow Servant.*

Any negligence of an inspector of the electrical apparatus of a trolley car, who, after inspecting it for efficiency, says: "All right. Put your pole on,"—acting on which the conductor puts on the trolley, and the car runs on him, the controller being open, is that of a fellow servant.

Appeal from court of common pleas, Philadelphia county.

Action by Lizzie B. Shugard against the Union Traction Company. Judgment for plaintiff. Defendant appeals. Reversed.

Charles Biddle and Thomas Leaming, for appellant.

Charles H. Edmunds, for appellee.

POTTER, J. Benjamin F. Shugard, the husband of the plaintiff in this case, was a conductor in the employ of the defendant company for a period of over 10 years. He was accidentally killed in Germantown upon the afternoon of September 29, 1900, under the following circumstances: When his car reached the terminus of the line, an inspector of the defendant company was there, waiting with a testing car, for

*As to whether a car inspector is a fellow servant or a vice principal, see note, 14 Am. & Eng. R. Cas., N. S., 558 et seq.

the purpose of making an inspection of the electrical apparatus. To facilitate this purpose, the car was stopped by the side of the testing car. The trolley pole was pulled down from the overhead wire and tied to the rear platform, so as to guard against the admission of any current of electricity from the overhead wire. The inspector in charge was inside of the testing car. His assistant stepped upon the front platform of the passenger car, bringing with him the end of a wire connected with the testing apparatus. The motorman of the passenger car was down upon the ground, but remained standing near the platform. The sole purpose of the test was to try the electrical connections upon the car, to be sure that they would properly utilize the current. The question of the safety of the car, either for the operators or for passengers, was not an element in this inspection at all. The test consisted in applying a wire connected with the testing apparatus to the various notches of the controller box, step by step. As the application to each notch was made, and indicated the proper condition, a bell was rung by the chief inspector, and then the assistant proceeded to turn on another notch by means of the controller handle. In this instance, according to the testimony, the controller was opened and closed some seven times, and the equipment was found to be in good condition, requiring no adjustment or repair. The test occupied but a few moments of time. The car was not taken away from the motorman or conductor, but was simply halted upon the track. While the test was being made, the motorman was within arm's length of his controller box and of the controller handle, and actually assisted in opening and closing the cover. The conductor, meanwhile, was sitting inside the car, looking over his accounts. There is some evidence to show that upon the completion of the test the inspector made use of the expression: "All right. Put on your pole." But whether or not he used these words, he undoubtedly did signify that the test had been completed and was satisfactory. The assistant inspector stepped down from the front platform. The motorman was in the act of stepping upon the platform to take his regular place, when the car suddenly started, and ran a distance of its own length and stopped. A cry was heard, and the conductor was found lying crushed beneath the end of the car. It was obvious that he had untied the trolley pole from the rear platform, and in accordance with his duty and his custom at this point, which was at the end of the line, he had swung the pole around to the other end of the car, and that immediately upon its coming in contact with the overhead wire the car had started, and had run against him, knocking him down and crushing out his life. It appears from the evidence in the case, and is a matter of common knowledge, that the electrical current which supplies power to the car comes from the overhead wire. It cannot enter the car unless the trolley pole is on the wire, and it cannot enter then unless the con-

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troller is open. The motorman does not state whether or not he looked at the handle of his controller after the test was finished, and does not state whether the handle was at that time turned so as to open the controller to the reception of the power. The inference is, however, unavoidable, that such must have been the fact, for he states that the car started almost instantly when the trolley pole touched the wire. There is nothing in the evidence to indicate any imperfection in the electrical equipment of the car, for the test had shown that everything was in good shape. The starting of the car must, therefore, have been the result of mismanagement in its operation by the men in control. In running the car the motorman was in charge of the controller, and, as a consequence, regulated the admission of power to the car. The conductor had charge of the trolley pole, and it was his duty to see that it was properly placed in contact with the overhead wire. He was an experienced conductor, and was familiar with the operation of the car, and must have known that if, by any chance, the controller was open, the effect would be to start the car as soon as the trolley pole came in contact with the overhead wire. He was, of course, dependent upon the motorman for protection against any misplacement of the controller handle. The motorman was standing just at the edge of the platform, where a glance would have shown him the position of the controller handle, but apparently he failed to notice it. He testified that during the course of the inspection the controller had been turned on and off seven times to admit the current from the testing car. He and the assistant inspector, who was also a motorman, were the only ones who had anything to do with the handling of the controller during the inspection, and they were both standing so close to the controller handle as to be able to touch it with their hands. At the moment of the accident the assistant inspector had left the platform of the passenger car, and the motorman was just in the act of taking his regular position at the controller, when, through the action of the conductor, contact was made with the overhead wire, and the deplorable result followed.

The trial judge instructed the jury that the case was bare of any evidence of negligence for which the defendant company could be held responsible, unless it were found in the conduct of Branson, the inspector. The court left it to the jury to say whether or not, under the evidence, Branson got such indications on his testing machine as would show that the controller was in the proper position when he said: "All right. Put on your pole,"—and said further that, if the jury believed that he gave the signal to restore the pole before he received indications that the controller was in the proper position, they might find that there was negligence for which the defendant company was responsible. We think the learned court misapprehended the testimony in this respect. A careful reading of the evidence upon this point, as it is be-

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fore us, shows that, in the position which Branson occupied, he could not tell whether the controller was on or off. He was asked: "Q. Does it [the controller] give its own signal when it is thrown off? A. If the hook is not removed from the pole, the needle would go to zero. That would show you that the controller was off. If they removed the hook from the pole, the needle would go to zero, also, and you could not tell whether the controller was off or on." This statement shows that Branson could not know from his own observation the position of the controller. His assistant, Plumb, and the motorman of the passenger car could readily see it. Branson denies giving any signal, except the one to his helper to throw the controller off when the test was finished. But even if he did use the words: "All right. Put your pole on,"—the expression was merely an indication that he was through with the test, and that the conductor and motorman might resume the use of the car. But under any aspect of the case, Branson was not acting in the discharge of any duty which the law imposes upon the employer, and therefore cannot be considered as a vice principal. When the employer has furnished reasonably safe appliances, and made suitable provision for their inspection and repair, his duty is done. He is not liable to an employee for the negligence of another employee who is intrusted with the use or management of the apparatus. As said before, the purpose of the inspection which Branson made was not to determine the safety of the car, either for the employee or the public. He was merely testing the efficiency of the electrical appliances, and while so engaged was merely a co-employee with his fellow workers. It would never do to hold an employer liable to one employee for the negligent or unskillful use by other reasonably competent fellow workers of the necessary and reasonably safe tools and appliances which had been furnished. The responsibility for this most unfortunate accident must therefore rest upon those who were co-employees of the deceased. The negligence, if any, was theirs, and nothing is disclosed by the evidence for which the defendant company should be justly held responsible.

The assignment of error is sustained, and the judgment is reversed, and is now entered here for the defendant.

GULF, C. & S. F. RY. CO. v. BURROUGHS.

(*Court of Civil Appeals of Texas, Dec. 19, 1901.*)

[66 S. W. Rep. 83.]

Injury to Property—Fires—Evidence—Harmless Error.*

In an action against a railroad company for negligently allowing fire

*As to the liability for injuries to property from fires set by locomotives, see generally, *Brennan Lumber Co. v. Great Northern Ry. Co.* (Minn.), 15 Am. & Eng. R. Cas., N. S., 478, and extensive note, 495 et seq.; 5 Rap. & Mack's Dig. 857 et seq.; 13 Am. & Eng. Enc. Law (2d Ed.) 497 et seq.

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to escape, where the undisputed evidence showed that the fire resulted from the negligence of defendant, evidence that at the time the fire was set the train crew did not return to assist in extinguishing it, even if irrelevant, was not prejudicial to defendant.

Error from district court, Harris county; Wm. H. Wilson, Judge.

Action by J. J. Burroughs against the Gulf, Colorado & Santa Fe Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

J. W. Terry and Blake Dupree, for plaintiff in error.

J. M. Gibson and F. G. Hooser, for defendant in error.

PLEASANTS, J. Defendant in error brought this suit to recover of plaintiff in error damages for the destruction of certain personal property and for injury to certain real estate owned by defendant in error, alleging that said loss and injury was caused by a fire negligently set out by the plaintiff in error. The personal property alleged to have been destroyed consisted of a lot of nursery trees and the growing crop of hay upon about 80 acres of plaintiff's land. The injury to the land was caused, as alleged in the petition, by the burning of an orchard and of shade ornamental trees, shrubbery, and fences situated on said land, and by the destruction of the grass roots, and damaging the sod so that the production of grass would be greatly decreased for several years. The aggregate sum of the damages claimed in the petition amounted to \$3,261. The defendant below answered by a plea of general denial and plea of not guilty. The trial in the court below was by a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$600.

(Five paragraphs, containing no railroad law, omitted.)

The sixth assignment of error is as follows: "The court erred in admitting over the defendant's objection the testimony of the plaintiff's witness Charles Flemmell, as is shown by defendant's bill of exceptions number 2, which is as follows: 'Be it remembered that on the trial of the above numbered and entitled cause the plaintiff's attorney asked the witness Charles Flemmell the following questions: "Did the crew stop when the fire started? Did any of the railroad men come there to help put it out? Did the train stop, and any of the railroad men running the train come back to assist in putting out the fire?"—to which questions and the answers thereto the defendant objected for the reason that they are improper questions, and irrelevant and immaterial and misleading, which objection the court overruled, and permitted the plaintiff to answer as follows: "No, sir; not that day. The train kept on going,"—to which ruling of the court the defendant excepted, and here now presents its bill of exceptions No. 2, and asks that the same be made a part of the record in this cause.' " The undisputed testimony in the case shows that the fire which caused the injury to plaintiff's prop-

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erty was set out by the negligence of the defendant, and, conceding that the testimony complained of in this assignment was irrelevant and immaterial, its admission could not possibly have prejudiced defendant in any way. It could only bear upon the question of defendant's negligence, and that having, as before stated, been established by uncontroverted evidence, this testimony could not have resulted in any harm to defendant.

We think the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

GULF, C. & S. F. RY. CO. v. JOHNSON.

(Court of Civil Appeals of Texas, March 11, 1902.)

[67 S. W. Rep. 182.]

Fires—Evidence of Origin.

Evidence that several months after fire was set in plaintiff's house, at a time when trees between it and defendant's railroad were full of leaves, cinders were found on the roof, is too remote to show the fire was set by cinders from defendant's engine.

Same—Negligence—Instructions.

Incompetency of persons in charge of locomotive stated to have set fire by sparks not having been alleged as negligence, or been in issue, an instruction not to find for defendant, under certain circumstances, unless it was also found such persons were competent, is error.

Same—Same—Prima Facie Case—Rebuttal.*

While proof that fire was caused by sparks thrown by defendant's engine presents a prima facie case entitling plaintiff to recovery, unless rebutted, defendant need only meet it, and need not show by the preponderance of evidence that it was not negligent.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Oceana Johnson, by next friend, against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant.

Burke & Griggs, for appellee.

PLEASANTS, J. Appellee, by her next friend, W. T. Johnson, brought this suit to recover damages for personal injuries alleged to have been caused by the negligence of appellant. The circumstances under which appellee received the injuries complained of, and the negligence of the appellant by which such injuries are alleged to have been caused, are stated in the petition as follows: "That on or about the said first day of July, 1894, while the plaintiff, Oceana Johnson, lay in her crib or cradle in her said home, and over which said cradle was thrown a mosquito bar or netting, a passing locomotive or engine, No. 78, of the defendant company, to

*See Alabama G. S. R. Co. v. Taylor (Ala.), 21 Am. & Eng. R. Cas., N. S., 135, and foot-note, 136.

which were attached a long train of cars, by reason of defective machinery and appliances upon the said locomotive or engine, and the negligent and careless manner of the operation thereof by the said defendant, its agents, servants, and employees, the said engine or locomotive No. 78 emitted and threw live sparks of fire and burning cinders into plaintiff's said home, and upon the said cradle of said Oceana, igniting the clothing therein, and the said fire, once so started, quickly communicated to the clothing and person of the said infant child, Oceana Johnson, who then and at that time was about three months old, and, being entirely helpless and unable to extricate herself from said burning couch, the said Oceana Johnson was burned," etc. Appellant answered by general demurrer and general denial. The trial of the case in the court below by a jury resulted in a verdict and judgment in favor of appellee for \$4,500, from which judgment this appeal is prosecuted.

The conclusion we have reached as to the proper disposition of this appeal renders a statement of the facts unnecessary, and for the purposes of this opinion it is sufficient to say that the evidence upon all the material issues in the case was conflicting. There is evidence in the record tending to establish the allegations of the petition that the fire was caused by sparks emitted from appellant's engine No. 78, and that the engine was not properly equipped with spark arresting appliances, and was operated in a negligent and careless manner by appellant's servants at the time said sparks were thrown. On the other hand, appellant introduced evidence which tends to show that the fire was not caused by sparks thrown from its engine, and that said engine was equipped with the best known appliances for preventing the escape of sparks, and was being properly and carefully operated at the time the fire occurred. Plaintiff was allowed to show by the witness Wood that just after he moved into the house which was occupied by the plaintiff at the time of the accident he had the gutters and rain troughs attached to the house cleaned out, and found a quantity of cinders in said gutters on that side of the house next to the railroad track of appellant, and that he also had the cistern on said place cleaned out, and that the water found in the cistern was very black. This testimony was objected to by the defendant, on the ground that it showed a condition existing several months after the injury complained of, and was irrelevant and immaterial, and did not tend to show the condition of the engine which plaintiff alleged caused the injury. We think the objections to this testimony should have been sustained. The record shows that the injury to plaintiff occurred about the 1st of July, 1894, and that the witness moved into the house formerly occupied by plaintiff some time in March, 1895. It was also shown that there were several trees in plaintiff's yard near the house, and between it and the railroad track, which at the time of the injury were full of leaves and in thick foliage.

The fact that eight or nine months after the injury cinders were found in the gutters on the house, and that the water in the cistern was black, in no way tended to show what the fire by which plaintiff was injured was caused by sparks or cinders thrown by engine No. 78, as alleged by plaintiff. The fact that cinders from some of the numerous engines that passed plaintiff's house, after the blasts of winter had stripped the trees before mentioned of their foliage, may have fallen upon the house, does not tend to show that cinders from an engine could have been thrown into or even upon said house at the time of the injury when said trees were covered with foliage, nor does it tend to show that engine No. 78 ever threw any sparks or cinders into said house. We are of opinion that the circumstances established by this evidence are too remote to be material to any issue in the case, and the evidence should have been excluded.

One of the witnesses, Mrs. J. A. Downs, who testified by deposition for plaintiff, also testified by deposition for the defendant, and, in rebuttal of the testimony of this witness given for defendant, plaintiff offered the testimony of the witness R. L. Whitehead, the notary who took the depositions of said witness which were introduced by the defendant. In offering the testimony of the notary plaintiff's attorney made the following statement: "This is a set of depositions by Mrs. Downs, which the defendant read in evidence. I want to introduce this witness for the purpose of showing her manner and conduct at the time this notary went there to take her depositions, that the jury may judge of her actions and of the character of her testimony; that a part of her testimony in this very deposition may be rebutted. If the witness were before the jury they could judge of the credibility of her testimony. They could form that judgment partially by actions as well as by word of mouth. She has testified in here that she has not seen a soul connected with the defendant in this case; has not talked to anybody; and I propose to show by this witness, who took that deposition, the manner of her actions, and what she said during the time that he was taking her deposition." Defendant excepted to these remarks of plaintiff's counsel, on the ground that the proposed evidence was inadmissible, and the statements of counsel were made for the purpose of influencing the jury, and were improper. The court then, over defendant's objection, had the jury withdrawn, and, having heard the statements of the witness, allowed him to testify before the jury as follows: "Q. You are a notary public? A. I am, sir. Q. You took this deposition of Mrs. Julia A. Downs in October, 1900? A. I did, sir. Q. State to the jury what you said to her when you stepped upon the porch, and what she said to you, and what you did, and what she did, regarding the taking of this deposition,—just in the words and actions as near as you can repeat it. A. There is a gallery to this house, a front gallery;

I stepped upon the gallery, and there were three ladies in the room. I knocked upon the door and asked for Mrs. Downs. I had never seen any of the ladies previous to that time. Mrs. Downs was shown to me, and I introduced myself to her, and told her I had come to take her deposition. She asked me if I came from Mr. Dupree. I had these interrogatories in my hand, and I says, 'I have the questions Mr. Dupree has propounded,' and I showed her Mr. Dupree's signature. She told me it was a good thing I had come, because the other parties had been there yesterday, and asked me to come in. She wanted me to take the deposition in the front room, but I suggested to her that we go in the back room, where we would not be disturbed by the other ladies, and we went back there. I sat down like at this table, and she sat right where Mr. Blodgett is now in answering questions. Q. Now, what, if anything, did she say to you when you read any of those interrogatories in regard to writing down? A. There were some of these interrogatories, I don't know which ones they were, and when I read them to her she said to me, 'You know how it ought to be; just write it down.' That was her statement. I replied to her, 'No;' I wanted to put it down just as she stated it, word for word. and as nearly in her own language as I could." The defendant objected to this testimony on the ground, "(1) That the same was hearsay testimony. (2) That the witness could not in such manner affect the evidence taken before him as a notary public, to which he had certified; that he could not go behind his certificate as an officer and affect the credibility of the evidence in the manner and form in which her deposition was taken; and that the same was calculated to create prejudice against the defendant in the minds of the jury." The evident purpose of the plaintiff's counsel in introducing this testimony, as shown by his remarks and by the testimony, was to attack the credibility of the witness Mrs. Downs, and to prejudice the jury against the witness by showing that she did not want to give her testimony to any notary who had not been sent to her by defendant's attorney, Mr. Dupree. We know of no rule of evidence under which this testimony was admissible. The testimony of the notary as to any statement made by Mrs. Downs to him was clearly hearsay if introduced for the purpose of proving the truth of such statements. If such testimony was introduced for the purpose of impeaching Mrs. Downs, it was inadmissible, because no proper predicate had been laid. If it be conceded that Mrs. Downs testified, as stated by counsel for plaintiff, that she had not seen or talked to any one connected with the defendant in regard to the case, there is nothing in the testimony of the notary to contradict her upon this point; and there is no pretense that any predicate was laid for the introduction of any other statement made by her to the notary. But, aside from all this, the evidence was inadmissible, for the reason that Mrs. Downs was plaintiff's

witness, and her credibility could not be assailed by plaintiff. Having vouched for the credibility of the witness, plaintiff cannot be heard to impeach her. *Paxton v. Boyce*, 1 Tex. 317; *Goree v. Goree* (Tex. Civ. App.) 54 S. W. 1036.

The charge of the court contains the following paragraphs: "And if you find from the evidence that the plaintiff has proven these facts by a preponderance of the evidence, then the burden would be upon the defendant to prove, by a preponderance of the evidence, that such sparks, if any, in escaping from defendant's locomotive, were not caused by any negligence of the defendant or its employees, or to prove the existence of such state of facts as in the third paragraph of this charge you have been instructed would, if proven, absolve the defendant from liability; that is to say, if, from the evidence, you believe that sparks escaped from defendant's engine, and set fire to the bed and clothing of the plaintiff, Oceana Johnson, and that said fire so communicated to the bed and clothing of plaintiff injured her, then such state of facts, being proven, would constitute a prima facie case of negligence on the part of defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, you should render a verdict for the plaintiff. If, however, from the evidence, you believe that sparks of fire escaped from defendant's engine and set out the fire which caused the plaintiff's injuries, but that the engine from which said sparks escaped, if any, was, at the time the said fire was set out, equipped with spark arresters and appliances which practical experience has proven to be among the best known to prevent the escape of sparks, fire, or cinders from locomotives, and that such appliances and apparatus were in good order at the time the fire was set out, and that said engine was then being operated by competent employees, and was operated with ordinary care to prevent the escape of sparks, then, in such a state of facts, you are instructed that a prima facie case, if any, made by the escape of sparks and fire would be rebutted, and in such a state of facts, if any, you should find for the defendant. But if from the evidence you believe that the fire was caused by a spark or sparks emitted from the defendant's engine, and that defendant has failed to equip its engine to prevent sparks, if any, escaping, with spark arresters found by practical experience to be among the best known to prevent the escape of sparks, fire, or cinders, or that the agents or employees of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, or that such appliances, if any, were not in good order, or that said engine was not operated by competent employees, then in such a state of facts you are instructed that a prima facie case, if any, made out by proof of sparks escaping and causing fire, would not be rebutted, and you should in such a state of facts, if any, return a verdict for the plaintiff. Therefore, if you believe from the evidence that

the fire complained of by the plaintiff originated from sparks emitted from an engine of the defendant, and if you further believe from the evidence that said engine at the time said fire was set out was equipped with apparatus and appliances which practical experience has proved to be among the best known to prevent the escape of sparks, fire, or cinders from locomotives; and that such appliances and apparatus were in good order at the time the fire is alleged to have been set out; and if you further believe that said engine was at the time said fire was set out, carefully operated by competent and skillful employees, then, although you may further believe that the fire did originate from sparks emitted from an engine of the defendant, you will, in such event (if you so find the facts), find for defendant."

These paragraphs of the charge are assailed by appellant on the grounds that they present an issue not made by the pleading and evidence, are upon the weight of the evidence, and erroneously instruct the jury as to the burden of proof. We think it clear that the charge is open to the first of these objections. Plaintiff's petition does not allege, as a ground of negligence, the incompetence of the employees of defendant who were operating the engine at the time the fire occurred, and the competency or incompetency of such employees was not an issue in the case. No rule of law is more firmly fixed by the decisions of our courts than the rule which forbids a trial court to submit to the jury by his charge an issue not raised by the pleading in the case. The violation of this rule in the charge above quoted was manifestly prejudicial to the defendant. If the jury believed from the evidence the engine in question was properly equipped with appliances to prevent the escape of sparks, and was properly and carefully handled, the defendant was entitled to a verdict, even though the jury believed from the evidence that the fire was caused by sparks thrown by the engine, and yet this charge, in effect, instructs the jury that they could not, upon this state of facts, find for the defendant, unless they further found that the persons operating said engine were competent. *Railway Co. v. Vieno* (Tex. Civ. App.) 26 S. W. 230; *Railway Co. v. Gilmore*, 62 Tex. 391. It occurs to us that this charge would have been erroneous even if plaintiff had alleged the incompetency of the employees as one of the grounds of negligence, because, if the engine was properly equipped and properly and carefully handled on the occasion in question, defendant would be entitled to a verdict, regardless of whether the employees operating the engine were or were not generally incompetent. We are also of the opinion that the charge is erroneous in its application of the rule as to the burden of proof. While it is well settled that in cases of this character it is proper for the court to instruct the jury that proof on the part of plaintiff that the fire was caused by sparks thrown by the engine presents a *prima facie* case which would entitle plaintiff to

recover unless rebutted by the defendants, we do not think it proper for the court to instruct the jury that the burden in such case is upon the defendant to show by the preponderance of the evidence that it was not guilty of negligence. We understand the rule to be that, if the jury find from the evidence that the fire was caused by the engine, they should find for the plaintiff, unless the defendant meets such *prima facie* case by evidence showing that the engine was in proper condition and properly handled. But when the defendant introduces evidence which, standing alone, would be sufficient to rebut the presumption of negligence arising from the setting out of the fire by its engine, the jury, to find for the plaintiff, must believe from the whole case thus made that the plaintiff has shown, by a preponderance of the evidence, that the defendant was guilty of negligence. Any other rule would shift the burden of proof from the plaintiff to the defendant, which the supreme court, on the former appeal of this case, say is not done by permitting the court to instruct the jury that proof that the engine set out the fire presents a *prima facie* case which must be met by the defendant. In case of *Railway Co. v. Hitchins* (Tex. Civ. App.) 63 S. W. 1069, there are expressions which seem to conflict with the views here expressed, but the question under consideration in that case did not directly involve the issue presented here, and our statement of the rule in that case was not entirely accurate.

We have not considered the assignment which assails the verdict as being unsupported by the evidence, because, in view of another trial, it would not be proper for us to express any opinion upon the evidence.

The remaining assignments do not, in our opinion, present any reversible error, or any error which is likely to occur upon another trial of the case, and it would serve no useful purpose to discuss them.

For the errors before indicated, the judgment of the court below is reversed, and this cause remanded for a new trial.

Reversed and remanded.

On Motion to Extend Time to File Motion for Rehearing.
(March 14, 1902.)

GARRETT, C. J. On the 27th day of February, ult., this court rendered judgment in the above-entitled cause, reversing the judgment of the court below and remanding the cause for another trial, but the opinion of the court stating the reasons for reversing the judgment was not filed until the 11th day of March, inst. The appellee has filed a motion requesting the court to extend the time allowed by law in which to file a motion for rehearing, stating that it was impracticable to prepare such motion until after the opinion had been filed showing the reasons for reversal.

It is provided by article 1030, Rev. St., that any party desiring a rehearing of any matter determined

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by a court of civil appeals may, within 15 days after the date of the entry of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, file with the clerk of the court his motion in writing for a rehearing thereof. Article 1039 requires a conclusion of the law and facts of a cause to be filed within 30 days after it has been decided; provided that, where a cause has been reversed, then the court shall file reasons for reversing the same. It has been the practice in this court to announce the decision of causes from the bench and afterwards to file opinions, therein stating the conclusions of law and facts in causes finally disposed of, and of which the supreme court had jurisdiction to grant a writ of error, and in causes reversed and remanded for another trial to state the reasons for reversal, and sometimes several days have elapsed before the opinion has been filed. In causes in which a conclusion of law and fact is required, the law, in terms, allows 15 days after the filing in which to file a motion for rehearing. While, perhaps, the same rule is not made applicable by the statute to motions for a rehearing in causes that have been reversed and remanded, yet it has been the practice of this court to so apply it, and the party desiring to file a motion for rehearing in such causes is allowed to do so within 15 days after the filing of the opinion without necessity of making application for leave. The appellee will be allowed 15 days from the date of the filing of the opinion in which to file her motion for rehearing.

 ROBINSON v. LOUISVILLE RY. CO.

(*Circuit Court of Appeals, Sixth Circuit, December 17, 1901.*)

[112 Fed. Rep. 484.]

Street Railroads—Duty of Care in Operating Cars—Vehicles on Track.*

The rule that a steam railroad company owes no duty to trespassers on its track, except to use reasonable care to avoid their injury after they are seen, has no application to street railroads which occupy the streets of a city in common with the public, and an electric street railroad company is liable for an injury caused by one of its cars coming into collision with a wagon which was being driven on the track ahead of it, where the motorman, in the exercise of ordinary care, should have seen the wagon in time to stop his car before running into it.

Evidence—Admissibility of Opinions—Speed of Street Car.

The speed at which a street car was going at a given time is not a question for expert testimony, but any witness who saw it may state his opinion as to its speed; the weight to be given such opinion being a matter for the jury to determine, in view of his experience and the other facts shown.

Pleading—Sufficiency of Allegations of Petition—Waiver of Objections.

General allegations of negligence in a petition will be held sufficient to authorize the admission of the evidence introduced thereunder, where objection thereto is first made in the appellate court after judgment.

*See notes at end of case.

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In Error to the Circuit Court of the United States for the District of Kentucky.

The Louisville Railway Company operates a street railroad on Portland avenue, a much-traveled street, in the city of Louisville, where the plaintiff was riding on the back of a heavily loaded wagon, being driven in an easterly direction by one Green, his employer, in the track of the defendant, on the evening of September 22, 1899, when an electric car going in the same direction collided with the wagon, throwing the plaintiff to the ground and injuring him. At Twenty-Third street, and within a few feet of where the accident occurred, was an electric street light. The plaintiff saw the approaching car some two blocks away, and gave notice to the driver, who turned his horses out of the track, but before the wagon was clear the car struck it, overturning the wagon and injuring the plaintiff. The motorman testified that the car was not going more than three or four miles an hour, and that it was so dark he did not see the wagon until he was within about 30 feet of it, when he was unable to stop the car before the collision. Witnesses testified that they saw the wagon 125 or 200 feet away, and that there was no obstruction to the view for several blocks. Two witnesses testified that the car was going at a high rate of speed, but the court would not allow them to tell what the speed was, because they were not shown to be experts.

The court instructed the jury that the defendant's negligence, for which a recovery could be had, must be limited to the time after which the motorman discovered the wagon on the track, in the following words: "Now, if you believe from the evidence in the case, from a preponderance of the testimony, that the plaintiff was occupying that track in that wagon, in the way that he has himself described, and that the street car company's servants in operating the car could, after they discovered the wagon upon the track by the use of extraordinary efforts, have stopped the car in time to have prevented the injury, it was the duty of the railroad company to do it. It was the duty of the railroad company, as soon as they saw the wagon, to make every effort a man could fairly make to prevent the collision, so that in that point of view there might have been, though it is for you to say, something done by the street car company which a prudent man would have done; that is to say, the servants of the corporation might not have exerted all of the efforts they could to avoid the accident. * * * If you believe from the evidence that from the negligence of the street car company that the collision occurred, that is, if they could have seen the wagon upon the track far enough ahead to stop, it would have been their duty to do it; but, if you believe from the evidence that the plaintiff in this case saw the car approaching in time to have turned off the track to which he had at that time no right equal to that of the street car company, it was the duty

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of the plaintiff to have done so. * * * If he were thus knocked down and injured, he is not entitled to recover against the street car company at all, unless, as I said before, after the street car company did, in fact, discover him upon the track, they could, by the use of every effort that was required of them, all that a man could do, reasonably, he would not be entitled to recover, unless, after they did in fact discover him, they failed to exert all the efforts they could to avert the collision. So, I take it, the trouble you will have, if any, in deciding this case, will be as to when the plaintiff saw the approaching car, how far away, and what efforts were made to get the wagon off the track. * * * There must be negligence upon its part before you would be authorized to find any damages for plaintiff, provided you do not think that the injury was not caused or contributed to by the negligence of the plaintiff himself; and unless you think there was negligence after the defendant saw the plaintiff on the track, and that the defendant failed to exercise the care that I have described to prevent the accident, the law is for the defendant. Now, gentlemen, take the case and return a verdict. Counsel for Plaintiff: I should also like the court to instruct the jury that if the motorman saw the car, or could, by the exercise of ordinary care, have seen it— The Court: At what time? Counsel for Plaintiff: At any time while the wagon was there, if he saw the wagon, or could by the exercise of ordinary care have seen it, it was negligence for him to run into it. The Court: I don't think you are entitled to that instruction. Counsel for Plaintiff: You decline to give it? The Court: Yes; in that form. Counsel for Plaintiff: We ask an exception. Then I desire to ask the court to instruct the jury that it was the duty of the defendant to keep a reasonable lookout for obstructions. The Court: Yes; I think it was the duty of the street car approaching Twenty-Third street to sound the gong, and, if it didn't do it, that it was negligence. I think it was its duty to see the obstruction, and, having seen it, to avoid it if it could, but I do not see any negligence shown by the company at all, unless it was after the company had seen the man on the track. I see no evidence of negligence prior to that time. * * * The defendant is not bound for and the plaintiff is not entitled to any damages, unless after he was actually discovered on the track the motorman could, by the use of the means at his command, have then kept from hurting him. * * * I have said to the jury that I can see no evidence of any negligence on the part of the defendant, unless it was after the plaintiff had discovered the approach of the car."

The jury returned a verdict for the defendant, and the plaintiff brings the case here on writ of error, alleging that the court erred in refusing to allow the two witnesses to testify to the speed at which the car was going, and also in instructing the jury that the defendant's negligence, for which a

recovery could be had, must be limited to the time after which the motorman discovered the wagon on the track.

Bennett H. Young and Marion W. Ripy, for plaintiff in error.

Fairleigh, Straus & Eagles (David W. Fairleigh, of counsel), for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Taking the instructions as a whole, the jury must have understood that the question of the defendant's negligence should be confined to the time between the discovery of the wagon by the motorman and the collision. The court seems to have applied to the facts of this case the rule governing the liability of a defendant operating a steam railroad for injury to a person upon its right of way where the injury must be willfully inflicted, or caused by negligence so gross as to authorize the inference of willfulness to sustain a recovery. In such a case the company owes no duty to trespassers upon its tracks, and if, after the person is discovered, the engineer does all in his power to avert the accident, negligence cannot be imputed to the railroad company, and the plaintiff could not complain of the instructions here given. There is, however, no analogy between such a case and an injury caused by a street car occupying the streets of a city with pedestrians and teams. The defendant had no exclusive right to the use of the street between its tracks, but only the right to use it in common with the public. As a street car cannot turn out to the right nor to the left, it is the duty of a vehicle in advance of it to get out of the way, and not obstruct the passage, but the driver of the car must use care to prevent collisions. *Railway Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915; *Hicks v. Railway Co. (Mo.)* 25 L. R. A. 508, and cases cited in note (s. c. 27 S. W. 542). It was the duty of the motorman, in exercising the care incumbent on him, to ascertain whether the track ahead was clear, and to have his car under such control as to admit of its being stopped after he saw obstructions ahead of it. *La Pontney v. Cartage Co.*, 116 Mich. 514, 74 N. W. 712, and cases there cited. It follows that if he could, by the exercise of due care, have seen the wagon in which the plaintiff was riding as far as other witnesses testified to have seen it, and if he could, after he should, by the exercise of due care, have seen it, gotten his car under such control as to have prevented the collision, it was his duty to have done so, and those questions should have been left to the determination of the jury.

The court should have allowed the witnesses to testify to their opinions regarding the rate of speed at which the car was moving. It was not a question for experts. No technical

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knowledge was required for such an opinion. The experience the witnesses had had in observing the speed of passing objects would go to the weight of the testimony, not to its admissibility. 12 Am. & Eng. Enc. Law, 488-493, and cases there cited; Railroad Co. v. Van Steinburg, 17 Mich. 99 (Ann. Ed.), and cases cited in note.

The defendant claims that upon consideration of all the testimony the case should have been taken from the jury, and a verdict directed for it, and therefore the errors complained of were not prejudicial to the plaintiff. The only authority cited by counsel for this claim is Railroad Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921, and cases cited in that opinion. Those were cases of steam railroads, and the reasoning has no application to the facts of this case. The distinction is clearly shown in the opinion of Judge Jenkins in Stelk v. McNulta, 40 C. C. A. 357, 99 Fed. 138, and is pointed out above.

The objections made by the defendant to the evidence and instructions, not being admissible under the allegations of the petition, should have been made in the court below when the petition could have been amended to conform to the proofs. In the absence of such objection, the general allegations of negligence in the petition must be held sufficient after judgment.

The errors pointed out make it necessary to reverse the judgment, and order a new trial.

NOTES.

**CARE REQUIRED OF THOSE IN CHARGE OF STREET CARS
TO AVOID COLLISION WITH PERSONS, ANIMALS,
OR VEHICLES.***

I. In General.

A. General Rule.

B. General Statements of Doctrine.

1. Crowded Streets.
2. Use of Electricity.
3. Street Cars Compared with Other Vehicles.
4. Same as Care Due Passengers.
5. Greater Than Care Due Trespassers.
6. Greater Than Care Due Trespassers on Steam Railroad Tracks.
7. Person Seen to Be in Danger.
8. Misleading Instruction.
9. Unlawful Occupation of Street.
10. Contributory Negligence.

II. Illustrations.

A. Miscellaneous.

a. Negligence.

- (1) Assuming That Laborer near Track Did Not Require Warning of Danger.
- (2) Collision with Team—Speed and Failure to Signal.

*As some of the illustrations pertain to more than one branch of the subject, it may be necessary, in order to find all of them belonging to a particular branch, to examine the whole analysis.

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- (3) Crowd Waiting for Election Returns.
 - (4) Dogs.
 - (5) Infirm Pedestrians.
 - (6) Pedestrians on Track.
 - (7) Person Guilty of Gross Imprudence.
 - (8) Processions.
- b. Absence of Negligence.
 - (1) Accidental Fall on Track.
 - (2) Assumption That Person Seen on Track Will Avoid Danger.
 - (3) Runaway Horse.
 - (4) Person Lying on Track Mistaken for Dog.
 - (5) Street Hands.
- B. Duty to Look Out.
 - a. Negligence.
 - (1) In General.
 - (2) Attention Attracted by Women on Sidewalk.
 - (3) Collision with Patrol Wagon.
 - (4) Collision between Wagon and Car.
 - (5) Contributory Negligence.
 - (6) Dangerous Locality.
 - (7) Person Falling on Track.
 - (8) Street Sweepers.
 - b. Absence of Negligence.
 - (1) Attention Diverted by Other Duties.
 - (2) Horse Approaching Side of Car.
- C. Speed.
 - 1. In General.
 - 2. Crowded Streets.
 - 3. Bicyclist Riding on Track.
 - 4. Incompetent Driver.
 - 5. Unlighted Cars.
 - 6. Crossings.
 - 7. Point of Danger.
 - 8. May Assume That Street Sweeper on Track Will Avoid Danger.
- D. Crossings.
 - a. Negligence.
 - (1) In General.
 - (2) Lookouts.
 - (3) Speed.
 - b. Absence of Negligence.
 - (1) Vehicle Driven Suddenly on Track.
 - (2) Frightened Team.
 - (3) Impossibility of Stopping Car.
- E. Crossing or Going upon Tracks at Other Points Than Public Crossings.
 - 1. In General.
 - 2. Wanton and Reckless Conduct.
 - 3. Contributory Negligence.
 - 4. Presumptions That Those in Charge of Street Cars Are Warranted in Entertaining.
 - 5. Turning Suddenly upon Track.
 - 6. Not Required to Warn Pedestrian Having Knowledge of Car's Approach.
- F. Vehicles and Animals in Dangerous Situations.
 - 1. Vehicles Standing near Track.
 - 2. Same—Mere Miscalculation of Distance.
 - 3. Horse Backing towards Track.
 - 4. Not Sufficient Evidence of Negligence.
 - 5. Presumption of Negligence against Driver of Cart Passing Street Car.
 - 6. Frightened Horses.
- G. Vehicles Moving on Track.

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1. In General.
 2. Assumption That Vehicle Will Turn Out in Time.
 3. Contributory Negligence.
 4. Sufficiency of Evidence.
 5. Forcing Vehicle from Track—Scope of Employment.
- H. Children.
- a. Negligence.
 - (1) In General.
 - (2) Children Playing in Street in Violation of Ordinance.
 - (3) Child Seen in Vicinity of Track.
 - (4) Child Turning Suddenly Back on Track.
 - (5) Crossing Accidents.
 - (6) Failure to Stop Car When Child Was Seen Crossing Track.
 - (7) Dangerous Situation.
 - (8) School Children.
 - b. Absence of Negligence.
 - (1) Child About to Cross Track.
 - (2) Child Seen on Sidewalk.
 - (3) Crossing after Being Warned.
 - (4) Error of Judgment after Boy Was Struck by Car.
 - (5) Falling upon Track.
 - (6) Going Suddenly into Danger.
 - (7) Standing on Track in Apparent Defiance of Danger.
 - c. Duty to Look Out.
 - (1) In General.
 - (2) Assumption That Child Was Seen by Motorman.
 - (3) Attention Must Not Be Confined to One Child.
 - (4) Child Seen by Passenger.
 - (5) Looking Backwards at Car.
 - (6) Looking towards Sidewalk.
 - (7) Darkness.
 - (8) Impossibility of Seeing Child in Time.
 - (9) Failure to Look under Car for Children Not Negligence.

I. IN GENERAL.

A. GENERAL RULE.

It may be stated as a general rule, supported by overwhelming weight of authority, that those in charge of street cars, in order to avoid collisions with persons, animals or vehicles, must use reasonable care. That is, such care as an ordinarily prudent man would use. But what is reasonable care on the part of a motorman or driver of a street car depends upon circumstances; and is usually a question for the jury.

United States.—Metropolitan St. Ry. Co. *v.* Kennedy (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 509; *Stelk v. McNulta*, 99 Fed. Rep. 138, 40 C. C. A. 357; *Washington & G. R. Co. v. Wright*, 7 App. D. C. 295, 23 Wash. L. Rep. 844, 28 Chicago Leg. News 155.

Alabama.—Birmingham Ry. & E. Co. *v.* City Stable Co., 119 Ala. 615, 24 So. Rep. 558.

Arkansas.—Citizens' St. R. Co. *v.* Steen, 19 Am. & Eng. R. Cas. 30, 42 Ark. 321.

California.—Bailey *v.* Market Street Cable R. Co. (Cal.), 42 Pac. Rep. 914, 110 Cal. 320; *Cunningham v. Los Angeles R. Co.* (Cal.), 47 Pac. Rep. 452, 115 Cal. 561; *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. Rep. 591; *Everett v. Los Angeles Consol. Electric R. Co.*, 34 L. R. A. 350, 115 Cal. 105, 43 Pac. Rep. 207; *Fox v. Oakland Consol. St. Ry.* (Cal.), 9 Am. & Eng. R. Cas., N. S., 825; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447; *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. Rep. 829; *Wahlgren v. Market St. Ry. Co.* (Cal.), 62 Pac. 308.

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Colorado.—*Oliver v. Denver Tramway Co.*, 59 Pac. Rep. 79, 13 Colo. App. 543.

Connecticut.—*Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. Rep. 379; *Lawler v. Hartford St. R. Co.*, 72 Conn. 74, 43 Atl. Rep. 545; *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, 35 Atl. Rep. 1126.

Delaware.—*Higgins v. Wilmington City R. Co. (Super. Ct.)*, 1 Marv. (Del.) 352, 41 Atl. Rep. 86; *Maxwell v. Wilmington City Ry. Co.*, 1 Marv. (Del.) 199, 40 Atl. Rep. 945; *Price v. Charles Warner Co. (Sup. Ct.)*, 1 Penn. (Del.) 462, 42 Atl. Rep. 699; *Brown v. Wilmington City Ry. Co.*, 40 Atl. 936, 1 Penn. (Del.) 332, 12 Am. & Eng. R. Cas., N. S., 439.

Georgia.—*Conway v. New Orleans City & Lake R. Co. (Ga.)*, 24 So. Rep. 780.

Illinois.—*Calumet Electric Street R. Co. v. Lewis*, 68 Ill. App. 593, 48 N. E. Rep. 153, app'd in 168 Ill. 249; *Calumet Electric Street R. Co. v. Lynholm*, 70 Ill. App. 371; *Chicago West Div. Ry. Co. v. Ingraham*, 131 Ill. 659; *Chicago West Division R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474; *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397; *Finley v. West Chicago St. Ry. Co.*, 90 Ill. App. 368; *McGary v. West Chicago St. R. Co.*, 85 Ill. App. 610; *North Chicago Street R. Co. v. Allen*, 82 Ill. App. 128; *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 539; *Read v. Chicago West Div. R. Co.*, 8 Ill. App. 517; *Rack v. Chicago City R. Co.*, 50 N. E. Rep. 668, 173 Ill. 289; *West Chicago Street R. Co. v. Annis*, 62 Ill. App. 180; *West Chicago Street R. Co. v. McCallum*, 169 Ill. 240, 48 N. E. Rep. 424; *West Chicago Street R. Co. v. Stoltenburg*, 62 Ill. App. 420; *West Chicago Street R. Co. v. Sullivan*, 64 Ill. App. 628, aff'd in 105 Ill. 302, 46 N. E. Rep. 234; *West Chicago St. R. Co. v. Wizeman*, 83 Ill. App. 402.

Indiana.—*Citizens' St. Ry. Co. v. Damm*, 58 N. E. Rep. 564, 25 Ind. App. 511; *De Lon v. Kokomo City Street R. Co.*, 22 Ind. App. 377, 53 N. E. Rep. 847; *Elwood Electric St. Ry. Co. v. Ross*, 58 N. E. Rep. 536; *Kessler v. Citizens' Street R. Co.*, 20 Ind. App. 427, 50 N. E. Rep. 891.

Iowa.—*Beem v. Tama & T. Electric R. & L. Co.*, 104 Iowa 563, 10 Am. & Eng. R. Cas., N. S., 610, 73 N. W. Rep. 1045; *Eddy v. Cedar Rapids & M. C. Ry. Co.*, 98 Iowa 626, 67 N. W. Rep. 676; *Hart v. Cedar Rapids & M. C. Ry. Co. (Iowa)*, 80 N. W. Rep. 662; *Wilkins v. Omaha & C. B. R. & B. Co.*, 96 Iowa 668, 65 N. W. Rep. 987.

Kansas.—*Topeka City R. Co. v. Higgs*, 34 Am. & Eng. R. Cas. 529, 38 Kan. 375, 16 Pac. Rep. 667.

Louisiana.—*Campbell v. New Orleans City R. Co.*, 28 So. Rep. 985, 104 La. 183; *Farrar v. New Orleans & C. R. Co.*, 26 So. Rep. 995, 52 La. Ann. 417; *Gannon v. New Orleans City & Lake R. Co. (La.)*, 20 So. Rep. 223; *Hemmingway v. New Orleans C. & L. R. Co.*, 56 La. Ann. 1087, 23 So. Rep. 952; *Knoker v. Canal & C. R. Co.*, 52 La. Ann. 806, 27 So. Rep. 279; *Kramer v. New Orleans City & L. R. Co.*, 51 La. Ann. 1689, 26 So. Rep. 411; *McGuire v. Railroad Co.*, 16 South. 457, 46 La. Ann. 1543; *McLaughlin v. New Orleans & C. R. Co.*, 48 La. Ann. 23, 18 So. Rep. 703; *O'Rourke v. New Orleans City & L. R. Co. (La.)*, 25 So. Rep. 323; *Ponsano v. St. Charles St. R. Co.*, 26 So. Rep. 820, 52 La. Ann. 245; *Schneidau v. New Orleans & C. R. Co. (La.)*, 19 So. Rep. 918.

Maryland.—*Baltimore Traction Co. v. Wallace (Md.)*, 26 Atl. Rep. 518; *Siatick v. Northern Cent. Ry. Co.*, 48 Atl. Rep. 149, 92 Md. 213.

Massachusetts.—*Collins v. South Boston R. Co. (Mass.)*, 26 Am. & Eng. R. Cas. 371; *Doyle v. West End Street R. Co.*, 161 Mass. 533; *White v. Worcester Consol. Street R. Co. (Mass.)*, 44 N. E. Rep. 1052, 167 Mass. 43.

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New Jersey.—*Atlantic Coast Electric R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. Rep. 1041, 6 Am. Neg. Rep. 125; *Bergen County Traction Co. v. Heitman* (N. J.), 11 Am. & Eng. R. Cas., N. S., 286; *Consolidated Traction Co. v. Glynn*, 37 Atl. Rep. 66, 59 N. J. L. 432; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. Rep. 135; *Consolidated Traction Co. v. Scott*, 33 L. R. A. 122, 58 N. J. L. 682, 34 Atl. Rep. 1094, 55 Am. St. Rep. 620, 4 Am. & Eng. R. Cas., N. S., 371; *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10, 44 Atl. Rep. 964; *North Hudson County R. Co. v. Isley*, 34 Am. & Eng. R. Cas. 94, 49 N. J. L. 468, 10 Atl. Rep. 665, 9 Cent. Rep. 122.

New York.—*Alexander v. Rochester City & B. R. Co.*, 128 N. Y. 13; *Bittner v. Crosstown Street R. Co.*, 153 N. Y. 76, 46 N. E. Rep. 1044, 67 N. Y. S. R. 367, 33 N. Y. Supp. 672, 9 Am. & Eng. R. Cas., N. S., 152; *Berke v. Twenty-Third St. R. Co.*, 4 N. Y. Supp. 905; *Bernhard v. Rochester R. Co.*, 68 Hun 369; *Brooklyn Heights R. Co.*, 62 N. Y. S. 927, 48 App. Div. 557; *Bulger v. Albany R. Co.*, 42 N. Y. 459; *Cass v. Third Ave. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356; *Cohen v. Metropolitan St. Ry. Co.*, 68 N. Y. S. 830, 34 Misc. Rep. 186; *Conlon v. Rodgers*, 39 N. Y. S. R. 51; *De Soto v. Metropolitan Street R. Co.*, 37 App. Div. 455, 56 N. Y. Supp. 22; *Devine v. Brooklyn H. R. Co.*, 34 App. Div. 248, 54 N. Y. Supp. 626; *Ewing v. Atlantic Ave. R. Co.*, 34 N. Y. S. R. 113, 11 N. Y. Supp. 626; *Frank v. Metropolitan St. Ry. Co.*, 60 N. Y. S. 616, 44 App. Div. 243; *Gallagher v. Coney Island, etc., R. Co.*, 4 N. Y. Supp. 870, 24 N. Y. S. R. 764; *Geipel v. Steinway R. Co.*, 14 App. Div. 551, 43 N. Y. Supp. 934; *Greenburg v. Third Ave. R. Co.*, 35 App. Div. 619, 55 N. Y. Supp. 135; *Griffith v. Metropolitan St. Ry. Co.*, 66 N. Y. S. 801, 32 Misc. Rep. 289; *Hargert v. Union R. Co.*, 25 App. Div. 218, 49 N. Y. Supp. 307; *Hirschman v. Dry Dock, E. B. & R. R. Co.*, 61 N. Y. S. 304, 46 App. Div. 621; *Holzman v. Metropolitan St. Ry. Co.*, 4 N. Y. S. 1120, 31 Misc. Rep. 644; *Hyland v. Yonkers R. Co.*, 15 N. Y. S. R. 824, 48 Hun 617, 1 N. Y. Supp. 363; *Kitay v. Brooklyn, Q. C. & S. R. Co.*, 23 App. Div. 228, 48 N. Y. Supp. 982; *Lavin v. Second Ave. R. Co.*, 112 App. Div. 381, 42 N. Y. Supp. 512; *Lunday v. Second Ave. R. Co.*, 1 Misc. 100, 48 N. Y. S. R. 676, 20 N. Y. Supp. 691; *McCormack v. Nassau Electric R. Co.*, 16 App. Div. 33; *McFarland v. Third Ave. R. Co.*, 60 N. Y. S. 273, 29 Misc. Rep. 121; *McGrane v. Flushing & C. P. E. R. Co.*, 13 App. Div. 177, 43 N. Y. Supp. 385; *McQuade v. Metropolitan Street R. Co.* (Sup. Ct. App. Term), 17 Misc. 154, 39 N. Y. Supp. 335; *Martin v. Third Ave. R. Co.*, 27 App. Div. 52, 50 N. Y. Supp. 284; *Morrissey v. Westchester Electric R. Co.*, 18 App. Div. 57, 45 N. Y. Supp. 444; *Moroney v. Brooklyn City R. Co.*, 30 N. Y. S. R. 911, 9 N. Y. Supp. 546; *Mugent v. Metropolitan Street R. Co.*, 17 App. Div. 582, 45 N. Y. Supp. 596; *Quinn v. Atlantic Ave. R. Co.*, 34 N. Y. S. R. 801, 12 N. Y. Supp. 223, *aff'd* in 134 N. Y. 611; *Reilly v. Third Ave. R. Co.* (Sup. Ct. App. Term), 16 Misc. 11,

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73 N. Y. S. R. 289, 37 Supp. 393; *Schulman v. Houston, W. S. & P. F. R. Co.* (N. Y. Super. Ct.), 15 Misc. 30, 36 N. Y. Supp. 439, 71 N. Y. S. R. 489; *Schwarzbaum v. Third Ave. R. Co.*, 66 N. Y. S. 367, 54 App. Div. 164; *Seifter v. Brooklyn Heights R. Co.*, 66 N. Y. S. 1107, 55 App. Div. 10; *Spaulding v. Jarvis*, 32 Hun 621; *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. Rep. 277; *Stierle v. Union R. Co.*, 156 N. Y. 684, 50 N. E. Rep. 834; *Towner v. Brooklyn Heights R. Co.*, 60 N. Y. S. 289, 44 App. Div. 628; *Witte v. Brooklyn City R. Co.*, 53 N. Y. S. R. 334.

Ohio.—*Bethel v. Cincinnati Street R. Co.*, 15 Ohio C. C. 381, 86 Ohio C. D. 310; *Cincinnati Street R. Co.*, 4 Ohio N. P. 224, 4 Ohio Leg. News 300; *Colter v. Cincinnati St. Ry. Co.* (Ohio), 18 Ohio Cir. Ct. R. 382; *Lawrence v. Pendleton St. R. Co.* (Ohio), 1 Cir. Super. Ct. 180; *McKeown v. Cincinnati Street R. Co.*, 2 Ohio Leg. News 388, 390; *Siek v. Toledo Consol. Street R. Co.*, 9 Ohio C. D. 51, 16 Ohio C. C. 393.

Oregon.—*Caughty v. Willamette St. R. Co.*, 21 Ore. 245.

Pennsylvania.—*Breary v. Traction Co.* (C. P.), 5 Pa. Dist. R. 95; *Buente v. Pittsburg, A. & M. Traction Co.*, 2 Super. Ct. (Pa.) 1185; *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86; *Ehrisman v. East Harrisburg City Pass. R. Co.*, 51 Am. & Eng. R. Cas. 190, 15 Pa. St. 180; *Flanagan v. People's Pass. R. Co.*, 163 Pa. St. 102, 1 Am. & Eng. R. Cas., N. S., 268; *Fleishman v. Neversink Mountain R. Co.*, 174 Pa. St. 510, 4 Am. & Eng. R. Cas., N. S., 261; *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. 31; *Gould v. Union Traction Co.*, 190 Pa. 198, 43 W. N. C. 521, 5 Am. Neg. Rep. 717, 42 Atl. Rep. 477; *Harkins v. Pittsburg, A. & M. Traction Co.*, 173 Pa. 149, 38 W. N. C. 163, 23 Pitts. L. J. N. S. 427, 33 Atl. Rep. 1045; *Hunter v. Consolidated Traction Co.*, 44 Atl. Rep. 578, 193 Pa. St. 557; *Johnson v. Reading City Pass. Co.*, 160 Pa. St. 647, 28 Atl. Rep. 1001; *Jones v. Greensburg J. & P. Street R. Co.*, 9 Pa. Super. Ct. 65, 43 W. N. C. 298; *Kane v. People's Pass. R. Co.*, 181 Pa. 53, 37 Atl. Rep. 110; *Karahuta v. Schuylkill Traction Co.*, 6 Pa. Super. Ct. 319, 42 W. N. C. 47; *Kestner v. Pittsburgh & B. Traction Co.*, 158 Pa. St. 422, 27 Atl. Rep. 1048; *Koersen v. Newcastle Electric St. Ry. Co.*, 47 Atl. Rep. 850, 198 Pa. 26; *Oster v. Schuylkill Traction Co.*, 195 Pa. St. 320, 45 Atl. Rep. 1006; *Patton v. Philadelphia Traction Co.*, 132 Pa. St. 76, 20 Atl. Rep. 682; *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615, 38 Am. & Eng. R. Cas. 487; *Phillips v. People's Pass. R. Co.*, 190 Pa. 222, 43 W. N. E. 531, 5 Am. Neg. Rep. 719, 42 Atl. Rep. 686; *Sauers v. Union Traction Co.*, 44 Atl. Rep. 917, 193 Pa. St. 602; *Thomas v. Citizens' Pass. R. Co.*, 46 Am. & Eng. R. Cas. 196, 132 Pa. St. 504, 19 Atl. Rep. 286; *Thompson v. United Traction Co.*, 44 Atl. Rep. 558, 193 Pa. St. 555; *Winter v. Federal Street & P. V. R. Co.*, 19 L. R. A. 232, 153 Pa. 26.

Rhode Island.—*Goldwick v. Union R. Co.*, 37 Atl. Rep. 635, 20 R. I. 128, 2 Am. Neg. Rep. 647.

Tennessee.—*Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32.

Texas.—*City Ry. Co. v. Thompson*, 20 Tex. Civ. App. 16, 47 S. W. Rep. 1038; *Ft. Worth St. R. Co. v. Witten*, 74 Tex. 202, 11 S. W. Rep. 1091; *Galveston City R. Co. v. Hewitt*, 6 Tex. 473, 3 S. W. Rep. 705; *Gutierrez v. Laredo Electric & Ry. Co.* (Tex. Civ. App.), 45 S. W. Rep. 310; *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. Rep. 829.

Utah.—*Hall v. Ogden City A. Ry. Co.* (Utah), 4 Am. & Eng. R. Cas., N. S., 77; *Thompson v. Salt Lake Rapid Transit Co.*, 52 Pac. Rep. 92, 40 L. R. A. 172, 16 Utah 281, 10 Am. & Eng. R. Cas., N. S., 563.

Virginia.—*Richmond Railway & E. Co. v. Garthright*, 32 L. R. A. 220, 92 Va. 627, 24 S. E. Rep. 267.

Wisconsin.—*Bishop v. Belle City Street R. Co.*, 92 Wis. 139, 65 N. W. Rep. 733; *Cawley v. La Crosse City Ry. Co.*, 106 Wis. 239, 82 N. W. Rep. 197; *Flaherty v. Harrison* (Wis.), 10 Am. & Eng. R. Cas., N. S., 176; *Holdridge v. Mendenhall*, 83 N. W. Rep. 1109, 108 Wis. 1; John-

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son *v.* Superior R. T. R. Co. (Wis.), 64 N. W. Rep. 753; Lockwood *v.* Belle City Street R. Co. (Wis.), 65 N. W. Rep. 866; Ryan *v.* La Crosse City Ry. Co., 83 N. W. Rep. 770, 108 Wis. 132; Slensby *v.* Milwaukee St. Ry. Co. (Wis.), 9 Am. & Eng. R. Cas., N. S., 527; Tesch *v.* Milwaukee Electric Railway & Light Co., 84 N. W. Rep. 823, 108 Wis. 593.

Canada.—Ewing *v.* Toronto R. Co. (C. P.), 24 Ont. Rep. 694; Haight *v.* Hamilton Street R. Co. (Du. Ct.), 29 Ont. Rep. 279; Lee *v.* Schuylkill Valley Traction Co. (Can.), 13 Mont. Co. L. Rep. 91; Toronto R. Co. *v.* Gosnell, 24 Can. S. C. 582.

B. GENERAL STATEMENTS OF DOCTRINE.

A street-railway company is liable for injuries to a pedestrian occasioned by carelessness, negligence, or want of attention, and which are not simply the result of an accident which could not have been foreseen by the exercise of ordinary and reasonable care and prudence. Wall *v.* Helena St. R. Co., 50 Am. & Eng. R. Cas. 474, 12 Mont. 44, 29 Pac. Rep. 721.

In Schierhold *v.* Railroad Co., 40 Cal. 447, the court said: "The drivers of street cars, through a densely populated city, ought always to have their teams under their immediate and absolute control, and are bound to drive in such a manner, if possible, as to injure no one. Messrs. Shearman & Redfield, in their treatise on Negligence, say: 'But inasmuch as the injuries which are caused by a railroad car are more serious than those inflicted by most other vehicles, it seems that a greater degree of care should be required of car drivers than of most other drivers. They are bound to watch persons on the track, or approaching the same, and to stop in the shortest time possible, so as to avoid coming into collision with them.' Volume 2 (4th Ed.) sec. 462."

The cable-car gripman is required to exercise ordinary care to prevent injuries to persons on the street, which would include the duty to stop the car so as to prevent a collision, if it could be done with safety to the car and its passengers. Pope *v.* Kansas City Cable R. Co., 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891.

A street car has the right of way in case of meeting a person or vehicle, but each party, in order to avoid an accident, must exercise ordinary care and such reasonable prudence as the surrounding circumstances require; and what may be considered ordinary care in one case may amount to culpable negligence in another. The existence of negligence in each case must depend on the circumstances peculiar to it. Hall *v.* Ogden City St. Ry. Co. (Utah), 4 Am. & Eng. R. Cas., N. S., 77.

It is error to instruct that those in charge of street cars are bound to exercise sufficient care to avoid injuring people in the street, only reasonable care being required by law. West Chicago St. R. Co. *v.* Wizeman, 83 Ill. App. 402.

1. Crowded Streets.

It is the duty of those operating street cars, especially on crowded city streets, to use the utmost care and diligence to avoid collisions. Liddy *v.* St. Louis R. Co., 40 Mo. 506.

Greater care is required in operating street cars in densely populated portions of a city than in the suburban streets. Brown *v.* Wilmington City Ry. Co. (Del.), 40 Atl. Rep. 936, 12 Am. & Eng. R. Cas., N. S., 439.

2. Use of Electricity.

Those in charge of electric street cars must exercise care proportionate to increased danger from use of electricity. Thompson *v.* Salt Lake Rapid Transit Co., 52 Pac. Rep. 92, 40 L. R. A. 172, 16 Utah 281, 10 Am. & Eng. R. Cas., N. S., 563.

A street-railway company has no superior right on a public street to that of the public at large, except the right to lay its track and operate its cars; and if it adopts a dangerous propelling power it must be held to a degree of care proportionate to the increase of

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danger to the public. *Hall v. Ogden City St. Ry. Co. (Utah)*, 4 Am. & Eng. R. Cas., N. S., 77.

3. Street Cars Compared with Other Vehicles.

Those operating ordinary street cars are ordinarily governed, as to the care to be observed, by the same rules that apply to other vehicles. *Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32.

The right of a street railway in a street is only an easement to use the highway in common with the public; it has no exclusive right of travel upon its track, and is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle. *Rascher v. East Detroit & G. P. R. Co.*, 90 Mich. 413, 51 N. W. Rep. 463.

But in *Cinn. St. R. Co. v. Whitcomb* (U. S. Cir. Ct. App. 6 Cir.), 66 Fed. Rep. 915, it was held that it is competent for the court to instruct the jury that the movement of an electric street car requires more care than in driving a wagon, where it likewise informs them that a proper degree of care is required considering the possibility of danger from its operation.

4. Same as Care Due Passengers.

In *Penny v. Rochester R. Co.*, 7 App. Div. 595, 74 N. Y. S. R. 732, 40 N. Y. Supp. 172, it was held that as high a degree of care was required of an electric street railway to prevent injuries to persons in the street as was due to its passengers.

5. Greater Than Care Due Trespassers.

Travelers on the streets have a right to use the tracks of the company and are not trespassers. A party using due care and diligence when using such street and tracks has a right to recover from the railroad company for injury inflicted by its gross fault and negligence, where the cause is proximate. *Cline v. Crescent City R. Co.*, 43 La. Ann. 327, 9 So. Rep. 122.

6. Greater Than Care Due to Trespassers on Steam Railroad Tracks.

A motorman is required to use greater care to avoid injuring people in the street than that exacted of the engineer of a steam railroad train running on the company's right of way at a point where a person walking thereon is a trespasser. *Stelk v. McNulta*, 99 Fed. Rep. 138, 40 C. C. A. 357.

7. Person Seen to Be in Danger.

The motorman of an electric car must use the highest degree of care to avoid injuring a person he sees to be in danger of being injured by the car. *Louisville Ry. Co. v. Blaydes (Ky.)*, 52 S. W. Rep. 960.

8. Misleading Instruction.

In an action against a city railway company for negligence in running into a buggy of the plaintiff, and injuring him and his property, an instruction to the jury which states that "as a matter of law" a company legally operating a street railway is entitled to the track when meeting foot passengers or vehicles, and, inasmuch as the street cars only go on a particular line, when one or the other is compelled to give the right of the road, that foot passengers or those traveling by ordinary methods must yield it to the street cars, was held calculated to lead the jury to the belief that the company was not bound to exercise due and proper care to avoid collision with others using the street, and hence was properly refused. *Chicago West Div. Ry. Co. v. Ingraham*, 131 Ill. 659.

9. Unlawful Occupation of Street.

In an action against a street-car company for injuring a person in the street there was an allegation that the track was unlawfully laid on the side of the street, the statute authorizing it only in the middle of the street. The company moved to strike out this allegation on the ground that it was irrelevant and immaterial: *held*, that plaintiff had a right to make an issue on this point. If it was unlawfully running its cars on the street, this would have a material bearing on

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the question of its liability. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

10. Contributory Negligence.

It is the duty of a motorman to try to avoid a collision even with a person guilty of contributory negligence. *Wilkins v. Omaha & C. B. R. & B. Co.*, 96 Iowa 668, 65 N. W. Rep. 987.

But where it appears that plaintiff was guilty of negligence directly contributing to the accident, he must show that the injury could have been avoided if defendant had exercised ordinary care. *Meyer v. Lindell R. Co.*, 6 Mo. App. 27.

II. ILLUSTRATIONS.

A. MISCELLANEOUS.

a. Negligence.

(1) Assuming That Laborer near Track Did Not Require Warning of Danger.

Whether a motorman is guilty of negligence in assuming that a laborer on the street, not so near the track as to be in danger of being struck by the car, did not require a signal to keep him from putting himself in a place of danger, is for the jury. *Eddy v. Cedar Rapids & M. C. Ry. Co.*, 98 Iowa 626, 67 N. W. Rep. 676.

(2) Collision with Team—Speed and Failure to Signal.

Where a team is injured by a train within the limits of a city, and upon one of its streets, and on the trial of an action to recover damages therefor there is testimony that the train was running at an unusual speed, that no effort was made to stop it or to warn the party in charge of the team of the approaching danger, and that no whistle was sounded or bell rung, it cannot be held that there is no evidence of negligence. *Pacific R. Co. v. Houts*, 12 Kan. 328.

(3) Crowd Waiting for Election Returns.

It is not negligence in a street-railway company not to discontinue the running of its cars merely because there is a large crowd in the street to ascertain the result of a presidential election. *Washington & G. R. Co. v. Wright*, 7 App. D. C. 295, 23 Wash. L. Rep. 844, 28 Chicago Leg. News 155.

(4) Dogs.

It may be negligence in a motorman to rely upon the quickness of a dog, and fail to exercise any care to avoid running over him. *Citizens' Rapid Transit Co. v. Dew*, 45 S. W. Rep. 790, 40 L. R. A. 518, 100 Tenn. 186. In this case it is said in the opinion: "It appears that the gong was not sounded, the motorman did not shout at the dog, and did not make any effort to check the car until it was so close that it was impossible to prevent running over the dog. The motorman excuses his act by saying that the dog came upon the track so abruptly and unexpectedly, and so nearly in front of the car, that there was no time to stop the car or sound the gong, or take any other precautions. There is other evidence to show that the dog could be seen, and was seen, quite a distance before the car reached him, and the weight of the evidence is in favor of this view of the case. The car was running rapidly and smoothly at the time, the dog was in plain view upon the track, and, according to some of the witnesses, the motorman was looking at him for some distance, and evidently expecting that he would leave the track in time to escape injury. All other questions out of the way, there is ample evidence to sustain the verdict of the jury as to the killing, the negligence of the motorman, and the reckless running of the cars at a rapid rate of speed, and without due precaution to prevent accidents to animals on the tracks."

(5) Infirm Pedestrians.

Special care is required of a motorman to avoid injuring persons apparently aged and infirm. *Haight v. Hamilton Street R. Co.* (Div. Ct.), 29 Ont. Rep. 279.

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(6) Pedestrians on Track.

While a company has a right to run its cars on a public street, yet the public have also a right to travel thereon, and the company must exercise such care and precaution, for the purpose of avoiding accidents and endangering property or persons, as reasonable prudence would suggest. It has only an equal right with the traveling public to the use of the street where its track is laid, with a few exceptions, such as that the cars run on a track, and when a vehicle meets a car it must give way. A person is entitled to walk on a street-railroad track, using reasonable care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track does not show contributory negligence on his part. *Shea v. Potrero & B. V. R. Co.*, 44 Cal. 414, 5 Am. Ry. Rep. 448.

(7) Person Guilty of Gross Imprudence.

The plaintiff in a suit for damages against a railroad company for injuries caused by defendant's car running over him, shown to have been alongside or in a position close to the track, with his legs across the nearest rail, and in that condition receiving his injuries, must, in order to recover, show with reasonable certainty that, notwithstanding his gross imprudence in thus exposing himself to peril, the defendant's motorman could, by the exercise of ordinary care, have averted the accident. *Kramer v. New Orleans City & L. R. Co.*, 51 La. Ann. 1689, 26 So. Rep. 411.

(8) Processions.

In an action to recover for personal injuries inflicted by a cable car, it appeared that the person injured was a member of a band which was marching on the street, that a car was approaching from behind, and that the injured person in endeavoring to overcome the effect of a high wind while near the track, leaned so far toward it as to be struck by the car, and he testified that he supposed he would hear warning of the approach of the car in time to escape or that the person in charge of the car would see his position in time to avoid injuring him. On behalf of the company, the person in charge of the car testified that it was going slowly, but a person formerly in the employ of the company testified that the grip was within one notch of the notch that would give the greatest speed, at the time the car was within one-half its length from the injured person. It also appeared that the car ran thirty-four feet after striking the party injured, and he testified that he heard no signal: *held*, that notwithstanding the negligence of the injured person, the company was liable because of the reckless disregard, by the person in charge of the car, of the consequences of his negligent operation of it. *Montgomery v. Lansing City Electric R. Co.* (Mich.), 61 N. W. Rep. 543.

If a military company occupies the whole of a street, street cars should stop long enough to give them time to move forward and pass the car on one or both sides of it; but a person riding at the head of such procession is bound to look out at a proper time and see if a car is coming. *Jatho v. Greb & C. St. Pass. R. Co.*, 4 Phila. (Pa.) 24.

b. Absence of Negligence.**(1) Accidental Fall on Track.**

A street-car company cannot be held liable for killing a person on the street where the company is free from negligence, and the death is caused solely by the person accidentally falling on the track. *Dorman v. Broadway R. Co.*, 117 N. Y. 655, 2 Silv. App. 422, 23 N. E. Rep. 162, 27 N. Y. S. R. 841, reversing 5 N. Y. Supp. 769, 25 N. Y. S. R. 1009.

(2) Assumption That Person on Track Will Avoid Danger.

In the absence of any circumstances indicating the contrary, a motorman of an electric car may assume that a person standing upon the track will step off in time to avoid the car after signals have been

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given. *Lyons v. Bay Cities Consol. R. Co.*, 4 Det. L. N. 797, 115 Mich. 114, 73 N. W. Rep. 139; *Daley v. Detroit Citizens' St. R. Co.*, 105 Mich. 193.

(3) Runaway Horse.

A motorman of an electric car cannot be charged with negligence merely for failing to stop the car on seeing a runaway horse approaching the track, where he had not time to decide as to what course was proper. *Phillips v. People's Pass. R. Co.*, 190 Pa. 222, 43 W. N. C. 531, 5 Am. Neg. Rep. 719, 42 Atl. Rep. 686.

(4) Person Lying on Track Mistaken for Dog.

In *Stelk v. M'Nulta (C. C. A.)*, 99 Fed. Rep. 138, where it appeared that the motorman of an electric car, at night, in the outskirts of the city, saw an object lying on the track about sixty-five feet ahead, which both he and a passenger standing beside him thought to be a dog, it is said in the opinion: "It is stipulated that the motorman had no reason to expect a human being to be upon the track at that place or at that time. The record does not explain the presence of the man, and we are unable to ascertain with what purpose or for what object a human being should be in that situation. The stipulation of fact is certainly reasonable that the motorman had no reason to expect the presence of a human being upon the track. We do not think, therefore, that the duty was imposed upon him, upon perceiving an object, to bring his car to a stop to discover the nature of the object. He did no less than his duty required of him to check the speed of the car and sound his gong, and so soon as he perceived that the object did not respond to the signal he reversed to bring the car to a standstill. Upon a level, under such circumstances, the car could have been stopped within forty feet, but, it being upon a downward grade, it could not be stopped within that distance. We cannot perceive that the motorman was lacking in any degree in the exercise of that prudence and care which, under the circumstances, the law imposed upon him."

(5) Street Hands.

In *Morrissey v. Westchester Electric R. Co.*, 18 App. Div. 57, 45 N. Y. Supp. 444, it is held that a motorman is not guilty of negligence as matter of law, in starting his car after stopping twenty-five feet from a place where a gang of men are opening a drain between the tracks, although one of them raised his hand for the purpose of stopping the car while the motorman is apparently looking at him and after crossing the track, stooped down with his back to the car to pick up a plank, one end of which is on the track and the plank is struck by the car and thrown against him.

B. DUTY TO LOOK OUT.**a. Negligence.****(1) In General.**

It is the duty of the driver of a street car to observe what is in the road before him, so as to avoid inflicting injuries upon others if practicable; and he is guilty of negligence if he omits, without apparent excuse, to exercise reasonable care in looking to see whether or not the track is clear and likely to remain so. *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. Rep. 829; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 477; *Price v. Charles Warner Co. (Super. Ct.)*, 1 Penn. (Del.) 462, 42 Atl. Rep. 699; *Citizens' Street R. Co. of Ft. Wayne v. Carey*, 56 Ind. 396; *Consolidated City & C. P. Ry. Co. v. Carlson (Kan.)*, 7 Am. & Eng. R. Cas., N. S., 274; *Paducah Street R. Co. v. Adkins*, 14 Ky. L. Rep. 409; *Gallaher v. Crescent City R. Co.*, 37 La. Ann. 288; *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310, 2 Am. & Eng. R. Cas. 18; *Dunn v. Cass Ave. & F. G. R. Co.*, 21 Mo. App. 188; *Kennedy v. St. Louis R. Co.*, 43 Mo. App. 1; *O'Flaherty v. Union R. Co.*, 45 Mo. 70, 100 Am. Dec. 343; *Stanley v. Union Depot R. Co.*, 114 Mo. 605; *Consolidated Traction Co. v. Glynn*, 37 Atl. Rep. 66, 59 N. J. L. 432; *Bulger v. The Albany Railway*, 42 N. Y.

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459; *Ehrman v. Brooklyn City R. Co.*, 38 N. Y. S. R. 900; *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625; *McCann v. Sixth Ave. R. Co.*, 56 N. Y. Super. Ct. 282, 117 N. Y. 505, 43 Am. & Eng. R. Cas. 297; *Manahan v. Steinway & H. P. R. Co.*, 35 N. Y. S. R. 813; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 300; *Pendril v. Second Ave. R. Co. (N. Y.)*, 2 Jones & S. 481; *Well v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147; *Citizens' P. R. Co. v. Foxley*, 107 Pa. 537; *Harkins v. Pittsburg, A. & M. Traction Co.*, 173 Pa. 149, 38 W. N. C. 163, 26 Pitts. L. J. N. S. 427, 33 Atl. Rep. 1045; *Trumbo v. City Street-Car Co.*, 89 Va. 780; *Richmond Railway & E. Co. v. Garthright*, 32 L. R. A. 220, 92 Va. 627, 24 S. E. Rep. 267; *Ewing v. Toronto R. Co. (C. P.)*, 24 Ont. Rep. 694.

Street-railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks. The public have a right to use these tracks in common with the companies, and, therefore, while the rights of the latter are in some respects superior to those of the former, it is not negligence per se for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down. *Gibbons v. Wilkesbarre & S. St. R. Co.*, 155 Pa. St. 279, 26 Atl. Rep. 417; *Kestner v. Pittsburgh & B. Traction Co.*, 158 Pa. St. 422, 27 Atl. Rep. 1048.

If one is on a street, where he has a legal right to be, in passing over it, it is the legal duty of the driver of a car approaching him to make a vigilant use of his senses to discover whether the party is in a position of peril, and to control the movement of his car, so far as possible, to avoid injury to him. *Watson v. Broadway & S. A. R. Co.*, 6 N. Y. S. R. 538, 43 Hun 636 mem., aff'd in 110 N. Y. 677 mem., 18 N. E. Rep. 482 mem.; *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. St. 31, 25 Atl. Rep. 651.

A street-railway company has no exclusive right to that part of the street covered by their tracks; the duty results that it shall see that its tracks are clear as their cars pass over them. This obligation is as imperative and firmly fixed as is the duty of steam-railway companies to their passengers; both result from the hazard to human life of the employment, no less than from the contract for carriage. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.

It is the duty of a motorman not only to look ahead but also on both sides of the track and to see whether there are conditions that will evidently compel persons to go upon the track in front of his car. *City R. Co. v. Thompson (Tex.)*, 20 Civ. App. 16, 47 S. W. Rep. 1038.

While electric railways have not an exclusive right to their tracks, their rights are superior to those of the traveling public. Their cars have the right of way and it is the duty of the citizens, whether on foot or in vehicles, to give unobstructed passage to the cars. On the other hand, it is the duty of the companies to see that their motormen shall be on the alert, not only at street crossings but everywhere upon the tracks, to see that citizens are not run down and injured. *Ehrisman v. East Harrisburg City Pass. R. Co.*, 51 Am. & Eng. R. Cas. 190, 150 Pa. St. 180, 24 Atl. Rep. 596.

Where electric cars are conducted so as to run from ten to twelve miles per hour on streets, it is the duty of those in charge to see that the track is clear, and also to exercise a constant watchfulness for persons who may be crossing the track. *Baltimore Traction Co. v. Wallace*, 17 Md. 435 26 Atl. Rep. 518.

The driver of a horse car must sit or stand on the front platform or place provided for him, must maintain control of the horses and car, and must exercise a reasonable degree of care and watchfulness

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to prevent collisions and injury to persons crossing or traveling on the streets. *Brooks v. Lincoln St. R. Co.*, 37 Am. & Eng. R. Cas. 560, 22 Neb. 816, 36 N. W. Rep. 529.

A street railway and a person going on foot having each the right of way along a public highway, each is bound to be on the lookout for the other; but, as the car is necessarily confined to its track, the right thereon of the person on foot is subordinate to that of the company. *Warner v. People's St. R. Co.*, 141 Pa. St. 615, 21 Atl. Rep. 737.

(2) Attention Attracted by Women on Sidewalk.

It is negligence in a gripman to allow his attention to be attracted by women on the sidewalk instead of looking ahead on the track. *Martin v. Third Ave. R. Co.*, 27 App. Div. 52, 50 N. Y. Supp. 284.

(3) Collision with Patrol Wagon.

In *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, a police officer with his patrol wagon was driving along the track carrying an injured man. He saw the car coming and hallooed to the driver and tried to turn out, but had to do so slowly on account of the sick man. The car company was held guilty of negligence in causing the collision, since, if the driver had been looking ahead at all, it would have been avoided.

(4) Collision between Wagon and Car.

Where it appears that plaintiff's wagon and defendant's horse car were approaching each other on the same track, and several witnesses testify that the car was being driven at an unusual rate of speed, and that the car driver was not looking at the track, but had his head turned away, and that he was so inattentive that, although one witness called to him, and his hand was on the brake, he made no effort whatever to check the speed of the car, and the driver contradicts such testimony, the case ought to be left to the jury upon the conflicting evidence. *North Hudson County R. Co. v. Isley*, 34 Am. & Eng. R. Cas. 94, 49 N. J. L. 468, 10 Atl. Rep. 665, 9 Cent. Rep. 122.

(5) Contributory Negligence.

Though a person driving on the street may be careless in failing to observe the approach of a car, still, if the driver urges his car forward at an unusual rate of speed when by reasonable diligence the party might have been discovered and the car stopped, the company is liable for any injury that is caused by a collision. *Citizens' St. R. Co. v. Steen*, 19 Am. & Eng. R. Cas. 30, 42 Ark. 321.

(6) Dangerous Locality.

The West End passenger train of the defendant company came to its stopping place on Canal street, where it was when plaintiff walked up to the train, and turned to the right, in order to board the smoking car at the end of the train. An electric car of the defendant company ran on its track, which was near the steam train. The projection of the electric car and the projection of the steam train (towards each other) made very narrow the path upon which plaintiff was walking, with his back to the electric car, by which he was knocked down, and greatly injured. The rule as to looking and listening had no application. About midday, defendant's motorman did not see plaintiff, who was walking in front, in a dangerous position, because of his advancing car: *held*, that there was no proper care on the part of the employee in charge of defendant's electric car. Such care and diligence must be exercised at dangerous places on a railway, to avoid inflicting injury, as the proper manning of a car requires. *Conway v. New Orleans City & Lake R. Co.*, 51 La. Ann. 146, 24 So. Rep. 780.

(7) Person Falling on Track.

It is negligence in a motorman to fail to see, in time to stop the car, one who falls on the track eighty feet from the approaching car. *Kitay v. Brooklyn, Q. C. & S. R. Co.*, 23 App. Div. 228, 48 N. Y. Supp. 982.

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(8) Street Sweepers.

Those in charge of street cars are bound to look out for street sweepers and others at work on tracks. *Dipaolo v. Third Ave. R. Co.*, 67 N. Y. S. 421, 55 App. Div. 566.

b. Absence of Negligence.

(1) Attention Diverted by Other Duties.

It cannot be held that a gripman is negligent because his attention is attracted for the moment from what is passing in the street by his other duties. *Culbertson v. Metropolitan Street R. Co.*, 140 Mo. 35, 36 S. W. Rep. 834.

It does not necessarily follow that the driver of a street car is guilty of negligence because he turned his head to discover the movements or signals of persons desiring to take passage. *Johnson v. Reading City Pass. Co. (Pa.)*, 28 Atl. Rep. 1001.

On cross-examination of the driver of a street car, which it was alleged caused an injury complained of, for the purpose of showing that his attention was liable to be diverted to the fare box in the car, it was held competent to show that his duty required him to turn so as to face the car, although his position at the time of the injury could not be shown with certainty. *McCoy v. Milwaukee S. R. Co.*, 88 Wis. 56.

In *Macon & I. S. Electric St. Ry. Co. v. Holmes (Ga.)*, 12 Am. & Eng. R. Cas., N. S., 385, it is said in the opinion: "There is no testimony whatever in the record imposing upon the conductor the duty of 'observing' the track in front of the cars, 'and that portion of the street contiguous to the track on either side.' The law not expressly imposing any such obligation, the question as to what the duties of this employee were in this particular was one of fact, and a subject-matter of proof. This charge was open to the objection, not only that it was an expression of an opinion upon the facts, but really an opinion not sustained by any of the testimony. There was no pretence on the part of the defendant company that its conductor on this particular occasion was on the lookout in the direction in which the car was going. On the contrary, the testimony showed that he was engaged inside of the car, and did not observe the plaintiff until after the injury. Hence, under this charge, the conclusion that the defendant was negligent was inevitable, and it was therefore clearly erroneous."

Plaintiff sued for damages resulting from the collision of a street car with her carriage while she was attempting to cross the track in front of an approaching car. It was shown that the driver of the car was, at the time, looking up and down the street to see if any passengers desired to board the car. But it also appeared that his attention was not unnecessarily, or for any unreasonable time, withdrawn from a view of the track. There was no evidence that he neglected to apply the brakes promptly, or that he failed to do any thing which he might have done to avoid a collision: *held*, that it was error to submit the question of such driver's negligence to the jury. *Thomas v. Citizens' Pass. R. Co.*, 46 Am. & Eng. R. Cas. 196, 132 Pa. St. 504, 19 Atl. Rep. 286.

But in *Hyland v. Yonkers R. Co.*, 15 N. Y. S. R. 824, 48 Hun 617, 1 N. Y. Supp. 363, it was held that the driver of a street car should not drive along the streets of a city without looking out for persons in the street. If he fails to look and an accident happens in consequence, he is chargeable with negligence. He is bound to be vigilant to discover any one exposed to danger, and to control his team so as to avoid danger; and the necessity of making change for passengers will not excuse an omission of this duty.

And in *Dahl v. Milwaukee City R. Co.*, 65 Wis. 371, 27 N. W. Rep. 185, it was held that if a company imposes upon its drivers other duties which materially interfere with their performance of the duty of keeping a constant watch of the track and the people approaching it, in order to prevent accidents, and if an injury results which could otherwise have been avoided, it is negligence.

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A motorman was not guilty of negligence in momentarily turning his eyes from the side of the street on which a bicyclist was about to emerge from behind a wagon and collide with the car. *Gould v. Union Traction Co.*, 190 Pa. 198, 43 W. N. C. 521, 5 Am. Neg. Rep. 717, 42 Atl. Rep. 477.

(2) Horse Approaching Side of Car.

It is not actionable negligence in the driver of a horse car to fail to prevent a horse from approaching, unseen by him, the side of the car, after the front part of the car has passed, so as to receive injuries from the rear wheel of the car on that side. *Lawrence v. Pendleton St. R. Co.*, 1 Cin. Sup. Ct. (Ohio) 180.

C. SPEED.

1. In General.

It is the duty of a motorman to have such control of his car as to be able to avoid injuring pedestrians who are in the exercise of due care. *Consolidated Traction Co. v. Glynn*, 37 Atl. Rep. 66, 59 N. J. L. 432.

A motorman must not run his car down grade at such speed as to make it impossible to control the car. *Price v. Charles Warner Co.* (Sup. Ct.), 1 Penn. (Del.) 462, 42 Atl. Rep. 699.

2. Crowded Streets.

It may be negligence to run a street car very rapidly through a crowded street. *Harkins v. Pittsburg, A. & M. Traction Co.*, 173 Pa. 149, 38 W. N. C. 163, 26 Pitts L. J. N. S. 427, 33 Atl. Rep. 1045.

3. Bicyclist Riding on Track.

A motorman is not guilty of negligence in approaching at the usual speed a bicyclist riding between double tracks, although the rider did not give any indication that he heard the gong, but turned suddenly and attempted to cross the track in front of the car. *Gagne v. Minneapolis Street R. Co.*, 77 Minn. 171, 79 N. W. Rep. 671.

In this case the court said in delivering the opinion: "Any one accustomed to ride on street cars, who is at all observant, must know that there is a very large number of bicyclists who ride between or near street-railway tracks, and who seem to think it is not 'good form' to get out of the way of an approaching car, or to give any indication of their being aware of its approach, until the very last moment. If a motoneer was required to stop or slow up in every such case until he was sure that the rider would get out of the way, it would be practically impossible to operate the cars so as to properly serve the public." See also, *Everett v. Los Angeles Consol. Electric Ry. Co.* (Cal.), 43 Pac. Rep. 207.

4. Incompetent Driver.

Plaintiff, in attempting to cross a track, was struck by the pole of an approaching car, knocked down, and dragged thirty or forty feet. While held between the scraper and the wheel, bystanders raised the end of the car to remove plaintiff, but were compelled, by a movement of the horses, to drop it before plaintiff was rescued, whereby he sustained dangerous injuries. Plaintiff's view of the track was obstructed by other vehicles. The driver was a boy of fifteen and a half years, lacking strength needful for his employment. The speed of the car was greater than that allowed by ordinance, but a competent driver could have stopped the car within fifteen feet, and within less distance had the speed of the car been within the limit of the city ordinance: *held*, that the negligence of defendant and contributory negligence of defendant and contributory negligence of plaintiff were questions for the jury. *Wall v. Helena St. R. Co.*, 50 Am. & Eng. R. Cas. 474, 12 Mont. 44, 29 Pac. Rep. 721.

5. Unlighted Cars.

A street car ought to be lighted in the nighttime, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else by some signal give warning of its approach. *Rascher v. East Detroit & G. P. R. Co.*, 90 Mich. 413, 51 N. W. Rep. 463.

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6. Crossings.

A street-car driver may drive his horse at a trot over a street crossing without being guilty of negligence. *West Chicago Street R. Co. v. Sullivan*, 64 Ill. App. 628, aff'd in 165 Ill. 302, 46 N. E. Rep. 234.

A railroad company may be liable for personal injuries to a pedestrian caught between street cars meeting at a crossing when rapidly moving. *West Chicago Street R. Co. v. Annis*, 62 Ill. App. 180.

It is gross negligence to so overload a street car and run it at such a rate of speed as to make it impossible to avoid a collision with a pedestrian at a street crossing. *Richmond Railway & E. Co. v. Garthright*, 32 L. R. A. 220, 92 Va. 627, 24 S. E. Rep. 267.

7. Point of Danger.

A street-railway company is guilty of gross negligence in running its electric cars at a high rate of speed at a point where the company has cut down the grade of a street, by the width of its tracks, some two feet, and piled the dirt from the excavation upon the street on either side of the track. It is an obstruction to public travel, and great care should be exercised in running the cars at such a place. *Greeley v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. St. 218, 25 Atl. Rep. 796.

8. May Assume That Street Sweeper on Track Will Avoid Danger.

But the driver of a street car upon seeing a person upon the track engaged in sweeping has the right to assume that such person will step out of the way, and is under no obligation to slacken his speed when proceeding at a lawful rate until he sees that such person is in danger. *Daly v. Detroit Citizens' St. R. Co.* (Mich.), 63 N. W. Rep. 73.

D. CROSSINGS.**a. Negligence.****(1) In General.**

Defendant's car stopped three or four feet below a crossing to permit a passenger to alight. While plaintiff was attempting to cross the street in the rear of the car, she was struck and injured by the car suddenly moving backwards as the driver relaxed the brakes. Defendant gave no evidence; the court denied plaintiff's request to go to the jury and dismissed the complaint: *held*, error, whether there was negligence on the part of the defendant or its servant should have been submitted to the jury. *Lundy v. Second Ave. R. Co.*, 1 Misc. 100, 48 N. Y. S. R. 676, 20 N. Y. Supp. 691.

It may be negligence to fail to warn a pedestrian seen approaching a crossing of the approach of a street car. *Schulman v. Houston, W. S. & P. F. R. Co.* (N. Y. Super. Ct.), 15 Misc. 30, 36 N. Y. Supp. 439, 71 N. Y. S. R. 489.

A street-car driver is bound to exercise greater care at a crossing than at other points. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462, 42 Atl. Rep. 699; *Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103.

In this case it is said in the opinion: "It would certainly be contrary to public policy, and in violation of the rights of the railway company, to allow its tracks to be blocked at street crossings by the negligence of drivers of vehicles; but a correct understanding of the rights and duties of both parties will avoid any confusion upon the subject. The public, using due care, have the right, in vehicles or on foot to cross the railway tracks, as well within the blocks as at street crossings. There is, however, this difference: The company has knowledge that at street crossings a larger number of persons and vehicles are usually found crossing the track than at other places, and this imposes upon the company the need of greater care at street crossings than where the danger is less. The company and the traveler are required to use such reasonable care as the circumstances of the case demand, an increase of care on the part of both being required when there is an increase of danger. The right of each must be exercised with due regard to the right of the other, and the right

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of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other. *O'Neill v. Railroad Co.* (N. Y. App.), 29 N. E. 84; *Railway Co. v. Cameron* (Neb.), 61 N. W. 606."

In *Omaha St. R. Co. v. Cameron* (Neb.), 61 N. W. Rep. 606, the court instructed the jury as follows: "You are instructed that the relative rights and duties of street cars and travelers on the highway where they are passing each other or going in the same direction is qualified to a certain extent at street intersections. At such an intersection each have the right to cross and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other": *held*, that the instruction was correct.

The driver of a vehicle upon a road used by the public at large, which crosses the track of an electric railway, must exercise reasonable care to avoid collision, and the same duty rests upon the motorman of a trolley car in approaching the crossing of such a road, whether the crossing is in the country or in a town; and, in case of accident, the question whether either or both of said parties failed in such duty is one to be determined by the jury, when the proofs on the subject of negligence leave that question in doubt. Neither party at such a crossing has a paramount right of way. *Atlantic Coast Electric R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. Rep. 1041, 6 Am. Neg. Rep. 125.

An electric car has no right superior to that of other vehicles at intersecting street crossings, and when the motorman finds a vehicle which has approached the crossing first, in the act of crossing the track, it is his duty to slow up in time to allow the vehicle to cross in safety. *Bernhard v. Rochester R. Co.*, 68 Hun 369, 51 N. Y. S. R. 880, 22 N. Y. Supp. 821.

At the intersection of streets, street cars, as to their right of way, have the same rights as other vehicles; and whichever is first on a crossing has the right of way, and the right to assume that the other will stop, or give to the one first reaching the crossing the right of way to which he is entitled. *Buhrens v. Dry Dock, E. B. & B. R. Co.*, 53 Hun 571, 25 N. Y. S. R. 191, 6 N. Y. Supp. 224, *aff'd* in 125 N. Y. 702 mem., 34 N. Y. S. R. 1012 mem., 26 N. E. Rep. 752.

(2) Lookouts.

It is the duty of a motorman to notice whether or not the track is clear when he approaches a public crossing. *Hall v. Ogden City A. Ry. Co.* (Utah), 4 Am. & Eng. R. Cas., N. S., 77.

At a street crossing as high a degree of care is required of those in charge of an electric street car as of those driving other vehicles; and it is negligence to run an electric street-railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision. *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, 55 N. W. Rep. 742.

The driver of a street car is bound to exercise the highest degree of care to avoid injuries, especially at street crossings, and on approaching a crossing in constant use must keep a lookout ahead, and the fact that he is giving attention to other matters in his line of business will not excuse his failure in that respect. *Thoresen v. La Crosse City R. Co.*, 87 Wis. 597.

(3) Speed.

A motorman may be guilty of negligence in failing to check the speed of his car when approaching a loaded truck which is being driven over a crossing. *Hugert v. Union R. Co.*, 25 App. Div. 218, 49 N. Y. Supp. 307.

Defendant company operated a street-car line using dummy engines for motive power. One of these was running at a high rate of speed

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on a dark and somewhat foggy night, without giving warning by bell or whistle at crossings, as it was required to do, and collided with plaintiff, who was driving on the street: *held*, that the company was guilty of negligence. *Hennessey v. Brooklyn City R. Co.*, 73 Hun 569, 26 N. Y. Supp. 321, 56 N. Y. S. R. 151.

b. Absence of Negligence.

(1) Vehicle Driven Suddenly on Track.

The proof disclosing that the driver of a small pleasure wagon had halted his team within a few feet of a street electric car track at the intersection of Carrollton avenue and Canal street, in the city of New Orleans, to wait for a steam train and an electric street car to pass, and suddenly put his horse and wagon in motion for the purpose of crossing the track, in front of another electric car, which was rapidly approaching, and only a short distance away and within easy open view: *held*, that the street-car company, its agents and employees, are not guilty of culpable negligence which rendered the defendant liable for the damages resulting from a collision between the car and wagon. *Hemmingway v. New Orleans C. & L. R. Co.*, 50 La. Ann. 1087, 23 So. Rep. 952.

(2) Frightened Team.

It appeared from the evidence that plaintiff drove his team near defendant's street-car tracks within a few feet of an approaching car, his view of the car having been obstructed; that the motorman instantly signaled for a clear track; that plaintiff's horses took fright and caused a collision; that the motorman was not chargeable with notice of the danger of the horses becoming frightened at the car and its signals; and that the car could not have been stopped in time to avoid the accident: *held*, that a verdict should have been directed for defendant, as requested, plaintiff's testimony as to negligence on the part of the motorman, contradicted by all the other evidence and by all reasonable probabilities from established facts, being insufficient to create a conflict in evidence which would warrant the submission of the question to the jury. *Flaherty v. Harrison (Wis.)*, 10 Am. & Eng. R. Cas., N. S., 176.

(3) Impossibility of Stopping Car.

Plaintiff testified that just as she stepped from the sidewalk to the crosswalk she looked to the left and saw a car about one hundred and twenty-five feet away, and she then looked to the right and saw another car nearer than the first car. She kept her eye on the latter car until she was struck and knocked down by the horses of the first car seen. It appeared that the driver of the car which struck her saw her, called several times to her, and made every effort to stop the car, and succeeded in doing so just as she was struck: *held*, that there was not sufficient evidence to justify a finding that the company was negligent. *Ewing v. Atlantic Ave. R. Co.*, 34 N. Y. S. R. 113, 11 N. Y. Supp. 626.

E. CROSSING OR GOING UPON TRACKS AT OTHER POINTS THAN PUBLIC CROSSINGS.

1. In General.

Reasonable care is required of a street-railroad company towards one crossing a street in front of its car. *Stanley v. Union Depot R. Co.*, 114 Mo. 606, 21 S. W. Rep. 832; *Ft. Worth St. R. Co. v. Witten*, 74 Tex. 202, 11 S. W. Rep. 1091.

The driver of a street car, who sees a carriage crossing the tracks in front of him at a walk, is not justified in going ahead, trusting that the carriage driver will get out of his way. The fact that the carriage driver can turn in any direction, and thus avoid the car, which is confined to its tracks, does not relieve the car driver of the duty to use ordinary care to avoid collision. *Gallagher v. Coney Island, etc., R. Co.*, 4 N. Y. Supp. 870; *Read v. Chicago West Div. R. Co.*, 8 Ill. App. 517; *Lamb v. St. Louis, etc., R. Co.*, 33 Mo. App. 489.

It cannot be held, as matter of law, that the gripman of a cable car

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is not negligent in running into a wagon which went upon the track when the car was one hundred feet away. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356.

It may be negligence in a motorman of an electric car to run into a wagon crossing the track when the car was stationary one hundred and thirty-three feet away. *McCormack v. Nassau Electric R. Co.*, 16 App. Div. 24, 44 N. Y. Supp. 230, 18 App. Div. 333.

A motorman of an electric car may be guilty of negligence in failing to slow up when he sees or should see a person trying to drive his vehicle across the track. *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86.

2. Wanton and Reckless Conduct.

If a motorman in charge of an electric car sees a person about to cross, or on the track ahead of him, in a vehicle and unconscious of his peril, and can, by exercising reasonable care and prudence, avoid the consequences of such person's negligence, and fails to do so, he is guilty of wanton and reckless conduct. *Little v. Superior R. T. R. Co. (Wis.)*, 60 N. W. Rep. 705.

3. Contributory Negligence.

Although a plaintiff is guilty of negligence in crossing the tracks of a street railway operated by electricity, the railway company is nevertheless liable to him for the damages suffered by him in consequence of his being run into by one of its cars, if the driver of the car either saw, or by the exercise of ordinary diligence could have seen, the peril of the plaintiff in time to have avoided the collision. *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65.

But a person who is guilty of the want of reasonable and ordinary care in attempting to cross the tracks of a street railway is not entitled to recover for injuries received by a car, unless the persons in charge thereof could have avoided inflicting the injury by the use of ordinary care after he saw, or by the use of ordinary care might have seen, the danger in which the person injured had placed himself. *Balto. Traction Co. v. Appel*, 80 Md. 603, 31 Atl. Rep. 964.

4. Presumptions That Those in Charge of Street Cars Are Warranted in Entertaining.

The motorman of an electric car has the right to assume that pedestrians will not go upon the track at places other than street crossings without looking for cars. *Bethel v. Cincinnati Street R. Co.*, 15 Ohio C. C. 381, 8 Ohio C. D. 310.

Where part of a cable car has passed a person standing near the track, and apparently intending to cross, the gripman has the right to assume that she will not move until his car has passed. *McQuade v. Metropolitan Street R. Co. (Sup. Ct. App. Term)*, 17 Misc. 154, 39 N. Y. Supp. 335.

In the absence of evidence to the contrary, the person in charge of a street car has the right to presume that a person walking along the side of track will not attempt to cross it immediately in front of the car. *Beem v. Tama & T. Electric R. & L. Co.*, 104 Iowa 563, 10 Am. & Eng. R. Cas., N. S., 610, 73 N. W. Rep. 1045.

When a motorman sees a bicycle rider going on the track in front of him he has the right to assume, up to the last moment, that he will exert himself to avoid a collision. *Everett v. Los Angeles Consol. Electric R. Co.*, 34 L. R. A. 350, 115 Cal. 105, 43 Pac. Rep. 207.

A motorman of an electric car, in absence of evidence to the contrary, has the right to presume that a horse being driven across the track will not stop thereon and refuse to proceed. *Lee v. Schuylkill Valley Traction Co. (Can.)*, 13 Mont. Co. L. Rep. 91.

A motoneer, while running his car, has a right, to some extent at least, to be governed by the belief that a person will not seek to cross the track unless his strength is sufficient to enable him to cross before the arrival of the car. *Farrar v. New Orleans & C. R. Co.*, 26 So. Rep. 995, 52 La. Ann. 417.

5. Turning Suddenly upon Track.

Where a pedestrian is standing near a car track at night, upon a

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frequented thoroughfare, giving no indication of an intention to cross, and attempts to cross only when a rapidly moving car is so near him as to render it practically impossible for the motoneer to prevent its striking him, there can be no recovery of damages for the injuries sustained. *Knoker v. Canal & C. R. Co.*, 52 La. Ann. 806, 27 So. Rep. 279.

In *Kessler v. Citizens' Street R. Co.*, 20 Ind. App. 427, 50 N. E. Rep. 891, it was held that a motorman is not guilty of negligence in colliding with a buggy, where it is without warning, turned upon the track about forty feet from the car and he does all that he can to stop the car.

Plaintiff, whose carriage was waiting at the curb, without observing the near approach of a car, got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned, intending to cross, but in such close proximity to the car that, but for the prompt action of the driver in turning his horse off the track, the horse would have collided with plaintiff's carriage; as it was, notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, which was upset, and plaintiff was thrown to the ground, and her leg fractured: *held*, that she could not recover. *Follet v. Toronto St. R. Co.*, 15 Ont. App. 346.

Plaintiff was traveling on the highway along defendant's street-railway track where she could have seen and heard a car approaching from behind, for several hundred feet, had she looked and listened for that purpose. She said she did look and listen but did not see or hear a car. She turned and drove onto the track for the purpose of passing a wood wagon that was going the same way she was. Before she got by the wood wagon, so as to turn to the right off the track in front of it, she was struck by a car and injured. After the accident the car stood about two car lengths from where it struck plaintiff's vehicle, and the wrecked vehicle was in the road behind the wood wagon. The motorman sounded his signal bell before and after plaintiff turned towards the track, and as soon as he observed she was going on the track he turned off the current, set the brakes and did all that he could to stop the car: *held*, that there is no room on the facts to say defendant was negligent. *Cawley v. La Crosse City Ry. Co.* (Wis.), 12 Am. & Eng. R. Cas., N. S., 453.

6. Not Required to Warn Pedestrian Having Knowledge of Car's Approach.

A street-car driver is not required to warn a pedestrian where he has knowledge of the approach of the car before he attempts to cross the track. *Schulman v. Houston, W. S. & P. F. R. Co.* (N. Y. Sup. Ct.), 15 Misc. 30, 36 N. Y. Supp. 439.

F. VEHICLES AND ANIMALS IN DANGEROUS SITUATIONS.

1. Vehicles Standing near Track.

It is negligence on the part of the motorman to run his car into a wagon left standing near the track, if he either saw the position of the wagon or should have seen it in time to prevent the collision. *Higgins v. Wilmington City R. Co.* (Super. Ct.), 1 Marv. (Del.) 199, 41 Atl. Rep. 86.

Where a street-car driver sees that a vehicle is standing so near the track that if he attempts to pass he cannot avoid striking it, it is his duty, if able to do so, to stop his car, and attempt to prevent a collision. *Laethem v. Ft. Wayne & B. I. R. Co.*, 100 Mich. 297.

The evidence for plaintiff tended to show that he hitched his horse and wagon near a curbstone where there was not room enough for a car to pass without hitting the wagon, and that a motorman, disregarding his signal to stop the car until he could unhitch his horse, drove the car into the wagon, and caused the injuries complained of. The evidence for defendant tended to show that there was sufficient room for the car to pass, but that the horse became frightened, and turned the wagon so that it was struck: *held*, that the case was for the jury. *Kestner v. Pittsburgh & B. Traction Co.*, 158 Pa. St. 422, 27 Atl. Rep. 1048.

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2. Same—Mere Miscalculation of Distance.

But in an action against a street-railway company by the driver of a dray, to recover damages for personal injuries, the testimony of the plaintiff showed no negligence on the part of the company's employees, but merely a miscalculation of distance on the part of both the plaintiff and the driver of the car: *held*, that it was not error to enter a judgment of nonsuit. *Patton v. Philadelphia Traction Co.*, 132 Pa. St. 76, 20 Atl. Rep. 682.

3. Horse Backing towards Track.

If, as the car is passing, the driver sees a horse loose in the street, dangerously near to and approaching the track backward, retreating from a boy who is endeavoring to get control of him, it is his duty to stop the car; and if he goes on, and the horse is injured by the rear wheel of the car, the company is liable unless plaintiff has been guilty of contributory negligence; in such a case it is a question for the jury to decide whose negligence actually caused the injury. *Lawrence v. Pendleton St. R. Co.*, 1 Cin. Sup. Ct. 180.

4. Not Sufficient Evidence of Negligence.

Plaintiff who had hitched his horse to an awning post, untied the hitching-strap while standing on the pavement, with some boxes between the horse and himself. Just then a cable car came along and the ringing of the bell alarmed the horse. It pulled the strap from plaintiff's hand, ran upon the track, and was struck by the cable car. Plaintiff testified that when the horse reached the track the cable car was about eighteen to twenty feet distant. He also testified that the gripman could have stopped the car and have seen the horse, but there was no evidence to corroborate his testimony in that respect: *held*, that there was not sufficient evidence to submit to the jury the question whether the gripman was negligent in not stopping the car in time to prevent a collision, the plaintiff not being qualified to express an opinion upon that point; that the ringing of the bell was not negligence; and that plaintiff could not recover. *Philadelphia Traction Co. v. Bernheimer*, 38 Am. & Eng. R. Cas. 487, 125 Pa. St. 615, 17 Atl. Rep. 477.

5. Presumption of Negligence against Driver of Cart Passing Street Car.

As a street car cannot vary from the line of its track, where it appears that a car and a cart are both passing side by side in the same direction, with a space of a foot and a half to two feet between them, if a collision occurs, the presumption of negligence is altogether against the driver of the cart, and not against the conductor of the car. *Suydam v. Grand St. & N. R. Co.*, 17 Abb. Pr. (N. Y.) 304, 41 Barb. 375.

6. Frightened Horses.

An instruction that if the motorman in charge of a street car could, in the exercise of reasonable care, have seen the plaintiff in time to have checked his car after plaintiff's horse sprang upon the track, and before the car collided with the horse, and if plaintiff was not guilty of negligence which contributed to his injury, then the defendant would be liable, is proper where it is qualified by another instruction that if the injury resulted from the sudden fright of plaintiff's horse, by reason of which said horse sprang in front of the moving car, and if the motorman, in the exercise of reasonable care, could not have checked the car in time to have prevented the collision, the defendant would not be liable, and where these alternatives present the only disputed propositions of fact involved. *Omaha St. R. Co. v. Duvall*, 40 Neb. 29.

The conductor of a street car was guilty of negligence in not stopping or slowing up his car which was running at a high rate of speed, where, as soon as he came in sight of plaintiff's horses, they began to rear and jump, and the conductor saw or ought to have seen, in the exercise of ordinary prudence, the team, and that they were frightened. *Gibbons v. Wilkesbarre, etc., R. Co.*, 56 Am. & Eng. R. Cas. 600, 155 Penn. St. 279, 26 Atl. Rep. 417.

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G. VEHICLES MOVING ON TRACK.**1. In General.**

A street-railway company is liable for failure to use reasonable care which results in a collision between a car and another vehicle while the latter is turning from the track. *Meyer v. People's R. Co.*, 43 Mo. 523; *Fettick v. Dickenson*, 22 How. Pr. 248; *Swain v. Fourteenth Street R. Co.*, 93 Cal. 179; *Fleckenstein v. Dry Dock, E. B. & B. R. Co.*, 105 N. Y. 655; *Arsen v. Brooklyn City R. Co.*, 9 Misc. 270; *Laethem v. Ft. W. & B. L. R. Co.*, 100 Mich. 297; *Bernard v. Rochester R. Co.*, 168 Hun (N. Y.) 369; *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. 31; *White v. Worcester Consol. Street R. Co.* 167 Mass. 43, 44 N. E. Rep. 1052, 167 Mass. 43; *Manor v. Bay Cities Consol. R. Co.*, 76 N. W. Rep. 139, 118 Mich. 1; *Holzman v. Metropolitan St. Ry. Co.*, 64 N. Y. S. 1120, 31 Misc. Rep. 644; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. Rep. 135; *Witte v. Brooklyn City R. Co.*, 25 N. Y. Supp. 1028.

In the case of a trolley car overtaking another vehicle directly in line with its progress, and a possible obstacle in its way, a proper regard for the rights of others requires that the car be reduced to such control that it may be brought to a standstill, if necessary, before reaching the obstructing vehicle. *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. Rep. 135.

A street-railroad company has not the exclusive right to the use of its tracks, but simply a paramount right, and while a person lawfully driving on the tracks may not recklessly, carelessly, or wilfully obstruct the passage of its cars, he is not absolutely bound to keep off or get off of the tracks, and if he fairly and in a reasonable manner respects the paramount right of the corporation, and is, without fault on his part, injured by carelessness or fault chargeable to it, he may maintain an action for his damages. *Fleckenstein v. Dry Dock, E. B. & B. R. Co.*, 105 N. Y. 655, 11 N. E. Rep. 951, 1 Silv. App. 447, 8 N. Y. S. R. 32.

Although an ordinance requires teams or vehicles to give way to street cars, yet the driver of such a car cannot ignore or disregard the presence of vehicles. *Thoresen v. La Crosse City R. Co.*, 87 Wis. 597.

It is proper to instruct a jury that if, by reason of inattention, carelessness, or incompetency, the driver of a street car fails to avoid a collision with a wagon upon the track, the company is responsible for an injury thereby occasioned to the occupant of the wagon, if there is no contributory negligence upon the part of the occupant or driver of the wagon. *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. Rep. 829.

A motorman seeing that a driver is trying to get his vehicle away from the car is bound to stop to prevent a collision, if he can do so. *Manor v. Bay Cities Consol. R. Co.*, 76 N. W. Rep. 139, 118 Mich. 1.

It is gross negligence in a motorman to attempt to pass a wagon when he knows that the driver cannot remove it before it is struck by the car. *Holzman v. Metropolitan St. Ry. Co.*, 64 N. Y. S. R. 1120, 31 Misc. Rep. 644.

2. Assumption That Vehicle Will Turn Out in Time.

Those in charge of a street car in the absence of circumstances warranting the assumption, cannot assume that a vehicle on the track will turn out in time. *Laethem v. Ft. W. & B. L. R. Co.*, 100 Mich. 297, 58 N. W. Rep. 996; *Bernard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; *Alexander v. Rochester City & B. R. Co.*, 128 N. Y. 13; *Gilmore v. Federal St. & P. V. Pass. R. Co.*, 153 Pa. 31.

Although one driving along an electric railway track has an unobstructed view of an approaching car, the motorman has not necessarily the right to assume that the driver of the vehicle will turn out in time to avoid the car. *White v. Worcester Consol. Street R. Co. (Mass.)*, 44 N. E. Rep. 1052, 167 Mass. 43.

In *Glazebrook v. West End Street R. Co.*, 160 Mass. 239, where it appeared that plaintiff, while driving in his wagon, in a broad street,

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with two of his wheels in defendant's street-car track, was met and run into by a car, it was held that the car driver had a right to assume that plaintiff would turn out in time, but that if plaintiff failed to do so, and the car driver saw this, it was his duty to stop the car and warn plaintiff off.

But a motorman of an electric car has a right to assume that the driver of a vehicle who has seen the car, will attempt to drive off the track before the car reaches him. *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, 35 Atl. 1126. In this case it is said in the opinion: "The driver heard the gong of the approaching car, turned, and saw the car coming behind him at a rate of speed greater than his own, when he was one hundred and twenty-five feet away. His wagon was partly on the track of the defendant. It was his duty to drive off the track without loss of time. He did not do so, but continued along on the track, where he knew he was in danger of being hit, and where the wagon was hit as soon as the car overtook him. This conduct was negligent. It was an omission to use ordinary care which contributed to the injury complained of, and precludes any recovery for that injury, unless the conduct of the motorman on the car obviated the effect of that negligence. It is true that the motorman did not lessen the speed of the car until the car was within fifteen feet of the wagon. He might rightfully act on the presumption that the driver would drive off the track before the car reached him. *Andrews v. Railroad Co.*, 60 Conn. 293, 299, 22 Atl. 566; *Glazebrook v. Railway Co.*, 160 Mass. 239, 35 N. E. 553; *Everett v. Railway Co.* (Cal.), 43 Pac. 207. And he had no duty to slacken his speed until he was made aware that the driver was not going to turn out."

3. Contributory Negligence.

Where plaintiff is driving upon a track when a car is approaching from the opposite direction, at a short distance and in plain sight, it is his duty to turn off the track to avoid a collision, and if he does not do so, through negligence or wilfulness, and a collision ensues, he cannot recover against the company, even if the latter was also in fault, unless the company or its servants wilfully caused the injury, or are guilty of such negligence or reckless conduct that plaintiff's is slight when compared with it. *Chicago, W. D. R. Co. v. Bert*, 69 Ill. 388.

4. Sufficiency of Evidence.

Plaintiff was driving a wagon along the tracks of defendant, and while in the act of turning off therefrom, an electric car coming from behind struck the hind wheel of his wagon and overturned it, causing the injuries complained of. A verdict was rendered for plaintiff: *held*, that the case was properly submitted to the jury. It was the duty of plaintiff to turn off seasonably to avoid the car approaching from the rear, and while so doing, the motorman was bound to exercise proper care to avoid a collision. *Witte v. Brooklyn City R. Co.*, 23 N. Y. Supp. 1028, 4 Misc. 286, *aff'd* in 143 N. Y. 667 *mem.*, 39 N. E. Rep. 22.

Plaintiff was driving a wagon on a street-car track, and when in the act of turning out, and nearly off the track, an electric car struck the hind wheel of his wagon and overturned it: *held*, that it was the duty of plaintiff to turn off seasonably to avoid a car approaching from the rear, and while doing so the motorman was bound to exercise proper care to avoid a collision; and the questions whether the motorman was guilty of negligence, or plaintiff of contributory negligence were for the jury. *White v. Brooklyn City R. Co.*, 53 N. Y. S. R. 334, 4 Misc. 286.

Evidence that the motorman failed to put on brakes until the car struck the buggy in which plaintiff was riding, though he had a clear view of the track for a block, and that the car was running at a rate of fifteen miles an hour, justified the jury in finding that the company's servants were guilty of negligence. *Central R. Co. v. Allmon*, 45 Ill. App. 389.

Upon evidence in an action for injuries sustained in a collision

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between defendant's electric car and plaintiff's wagon, tending to show, among other things, that while plaintiff was driving on defendant's track with his heavily loaded wagon he saw the car approaching and tried to turn out, but, owing to the slipperiness of the rails, his team was unable to pull the wagon from the track, and that the motorman of the car saw the plaintiff trying to get off the track, and his difficulty in doing so, in ample time to have stopped the car, it was error to direct a verdict in favor of the defendant. *Will v. West Side R. Co.*, 84 Wis. 42, 54 N. W. Rep. 30.

Plaintiff was injured by the falling of the horse on which he was riding. He testified that he was riding in the street, on one horse and leading another, and, when in the act of turning off defendant's track, the horse that he was riding was struck on the rump by a passing car, and afterward hit with the whip of the driver, whereby he became unable to manage it and it slipped and fell. The driver of the car admitted that the car touched one of the horses, but denied striking either with the whip, but there was evidence of other witnesses that the driver lashed his whip in the air for the purpose of keeping the horses back: *held*, that the question growing out of the conflict of evidence must be settled by the jury, and a verdict for plaintiff would not be disturbed. *Berke v. Twenty-Third St. R. Co.*, 22 N. Y. S. R. 492, 52 Hun 611 mem., 4 N. Y. Supp. 905.

In *Birmingham Railway & Electric Co. v. Pinkard* (Ala.), 26 So. Rep. 880, plaintiff averred negligence, and wanton, intentional wrong or injury, in separate counts. Plaintiff's evidence was that he was driving at a slow trot; that, owing to the narrowness of the street, he was forced by a passing barouche very near defendant's tracks; that his horse was there frightened by a car on the further track, going in the opposite direction, and was rendered, to a degree, unmanageable, and while he was endeavoring to pull him from the track a car came from behind at a speed of from fifteen to twenty-five miles an hour, striking the buggy and causing the damage; that the car was a block and a half away when the horse got on the track; that a person in the buggy with plaintiff hallooed to the motorman and threw up her hands, but he made no effort to stop or reduce the speed of the car until after the collision: *held*, that the court properly refused to charge the jury, if they believed the evidence, to find for the defendant on either or both counts; that the motorman was not guilty of wilful, wanton, or intention misconduct; and that plaintiff was guilty of contributory negligence.

A party was driving a cart in the streets of a city on the track of a street railway. The horse being breathed stopped, and the party got out and stood by his head. Seeing a steam dummy of the railway company approaching, he leaped upon the cart and endeavored to whip up his horse. The dummy then struck the cart killing the party. In an action to recover damages for his death, *held*, that the questions of negligence and of contributory negligence were both for the jury. *Market Street R. R. Co. v. McKeever*, 59 Cal. 294, 19 Am. & Eng. R. Cas. 123.

Plaintiff was injured while driving on defendant's tracks. He testified that while turning out to allow a car to pass, the rear of his cart was struck by the car, and he was thrown out and injured; that he looked for the car shortly before, and was listening for it up to the time he became aware of its approach. Defendant's driver testified that he saw plaintiff when thirty-five feet distant and called to him, put on the brakes fifteen feet away, but was unable to avoid a collision on account of the down grade and the condition of the tracks: *held*, that the questions of negligence and contributory negligence were properly submitted to the jury. *Quinn v. Atlantic Ave. R. Co.*, 34 N. Y. S. R. 801, 12 N. Y. Supp. 223, *aff'd* in 134 N. Y. 611.

5. Forcing Vehicle from Track—Scope of Employment.

Plaintiff was driving on a street when his progress was stopped by a blockade of trucks, and he was compelled to stop with the hind

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wheels of his vehicle on defendant's street-car track. The driver of a car approached and asked him to get off, when plaintiff told him to wait a minute and he would be able to move forward. Thereupon the driver cursed him, and said: "I will get you off some way or other," and as plaintiff was preparing to move forward the car struck the hind wheels of the vehicle and turned it over, injuring plaintiff: *held*, that this was not such a wilful or malicious act, or so far out of the ordinary business of the driver, as to relieve the company from liability. *Cohen v. Dry Dock, E. B. & B. R. Co.*, 8 J. & S. (N. Y.) 368, *aff'd* in 69 N. Y. 170.

H. CHILDREN.

a. Negligence.

(1) In General.

Greater care is required in controlling the movements of a street car to prevent injuries to children than is required to prevent adults from being injured. *Passamaneck v. Louisville R. Co.*, 98 Ky. L. Rep. 763, 32 S. W. Rep. 620.

Where a company is sued for negligently killing a boy nine years of age, it is not error in a trial court to refuse to charge "that the fact that the deceased was a child makes no difference in the application of the rule as to the question of negligence; if not of years of discretion he should have a protector." Children are entitled to more consideration and care than adults possessing full faculties. *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39, 34 How. Pr. 217, 93 Am. Dec. 490.

The drivers of street cars through a densely populated city ought always to have their teams under their immediate and absolute control, and are bound to drive in such a manner, if possible, as to injure no one. They may generally rely upon the instinct of self-preservation to induce every one to avoid injury, but when, from infancy or other apparent cause, a person liable to be injured cannot be expected to exercise the usual degree of prudence in this respect, a greater degree of caution is necessary on the part of the driver; and that which would be but ordinary negligence as to a grown person may be gross negligence as respects a child. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

Persons in charge of a street car on becoming aware that a young child is approaching the track with the apparent intention of crossing in front of the car, or upon discovering it upon the track, are charged with a higher degree of care than when aware of the presence of an adult under the same circumstances. *San Antonio St. R. Co. v. Mechler* (Tex.), 30 S. W. Rep. 899.

In *Citizens' St. R. Co. v. Steen*, 19 Am. & Eng. R. Cas. 30, 42 Ark. 321, the court said: "Whilst street-railway companies must, as we have said, be recognized as useful, and protected in all proper exercise of their right, and discharge of their duties in the public service, and whilst they must be absolved from such damages as occur from accidents occasioned by the negligence of others, which the employees of the company could not, in the exercise of due care, have averted; yet they must be held to such a reasonable regard to the lives and property of citizens, however negligent, as would be prompted by a sense of justice and humanity. They are not authorized to resent and punish carelessness, which gives their employees trouble and inconvenience. Their interests are not paramount to those of citizens who walk, or ride horses, or use other vehicles. There must be mutual care and mutual courtesies in the use of the streets. All cities are crowded with women and children, who necessarily go unprotected to school, to market, or on errands, or shopping, or visiting. Most of them are naturally heedless. The streets are for them also, and they are not to be unnecessarily jostled, frightened, lamed or treated with indignity, because they get upon the railway tracks, to say nothing of danger to life and limb."

It appeared from the evidence that plaintiff's child, a boy of about four and one-half years of age was sometimes permitted by his mother

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to play unattended upon the sidewalk in front of his residence, from which defendant's electric car tracks were easily accessible, being only one hundred feet away and on an intersecting street; and that at the time of the accident he had strayed upon the tracks while his mother was engaged in her household duties, though she had forbidden him to leave the house about fifteen or twenty minutes before he was killed by defendant's car: *held*, that even though such conduct on the part of the mother was negligence per se, it would not be sufficient to prevent recovery by plaintiff in an action against the electric car company, if it appeared from the evidence that those in charge of its car saw the child in time to avoid injuring him by the exercise of ordinary care. *Fox v. Oakland Consol. St. Ry. (Cal.)*, 9 Am. & Eng. R. Cas., N. S., 825.

(2) Children Playing in Street in Violation of Ordinance.

In *Budd v. Meriden Electric R. Co.*, 69 Conn. 272, 37 Atl. Rep. 683, it is held that the fact that a municipal ordinance forbids all persons from engaging in games or exercise within the limits of any highway does not lower the degree of care due from a motorman to a child non sui juris playing in the street.

(3) Child Seen in Vicinity of Track.

Whether or not the failure to stop a train, when the engineer saw an infant playing in the vicinity of a track, constituted negligence, was a question for the jury. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

It is for the jury to decide whether the driver of a street car, who sees a child under two years of age playing in the street within six feet of the track, and keeps a fast trot until he is within seven feet of the child, is guilty of negligence. *Farris v. Cass Ave. & F. G. R. Co.*, 80 Mo. 325, aff'g 8 Mo. App. 538.

(4) Child Turning Suddenly Back on Track.

It cannot be said as matter of law, that the motorman of an electric car is free from negligence where he runs over a child two and a half years old who, after crossing the track a few feet in front of the car, turns suddenly back on the track, where the car was moving slowly and was fifty or one hundred feet when the child left the sidewalk. *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 539.

It cannot be held, as matter of law, that it is not negligence to release the brake of an electric car on a down grade when a child is within ten feet of the car and five feet from the track, although the child has turned away from the track. *Woekner v. Erie Electric Motor Co.*, 176 Pa. 451, 38 W. N. C. 549, 35 Atl. Rep. 182.

(5) Crossing Accidents.

In *Thompson v. United Traction Co.*, 44 Atl. Rep. 558, 193 Pa. St. 555, it was held, that it was a question for the jury whether the motorman was negligent in failing to avoid a collision, it appearing that when the injured boy started across the street he was but eight feet from the track, and in full view of the motorman, and that the car was then sixty-five to seventy feet from the crossing.

Where the evidence shows that an electric car was either running at an extraordinary rate of speed, thus requiring a much greater space to stop it in than usual, or else that no effort was made to stop it, as there should have been, the question of the negligence of the person in charge of the car in running down a child of tender years is for the jury. *Riley v. Salt Lake R. T. Co. (Utah)*, 37 Pac. Rep. 681.

In an action against a street-railway company for injuries to a child three years of age at a street crossing, the jury found specially that the injuries were the result of the negligence of the driver of the car which ran against the child "taking into account the condition of the street, the extent to which it was used, the steepness of the grade, and all the facts and circumstances of the case bearing upon the question"; and that there was no contributory negligence on the part of those in charge of the child: *held*, that these findings entitled

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the plaintiff to judgment, although the jury further found that when the driver first saw the child, "or could have seen him, in the exercise of proper care," the car was about ninety feet distant from the child; that the child suddenly started from the place where he was first seen by the driver and ran towards the horses and the car; that he ran between the horses and the car before he could be prevented, and before the car could be stopped; that the driver did not have any reason to expect that the child would undertake to cross the street at the time; and that the defendant company was not guilty of any negligence other than that of the driver, which caused the injury. *Shenners v. West Side St. R. Co.*, 46 Am. & Eng. R. Cas. 187, 78 Wis. 382, 47 N. W. Rep. 622.

(6) Failure to Stop Car When Child Was Seen Crossing Track.

In *Elwood Electric St. Ry. Co. v. Ross* (Ind.), 58 N. E. Rep. 535, where it appeared that defendant's street car, while running at the rate of ten miles an hour, killed a child four years of age who was crossing the track; that the motorman saw the child in time to avoid running over it; that the child wore a bonnet which obstructed its view; and that the motorman called to the child but did not attempt to stop the car, *held*, that the evidence was sufficient to sustain a judgment against defendant.

(7) Dangerous Situation.

The evidence tended to show that the motorman of a car running four miles an hour, that could be stopped within twelve or fifteen feet, saw a child three and a half years of age at a point of danger fifty feet in front of him, and permitted the car to run over and kill the child: *held*, that it was error to direct a verdict for the railroad company. *Colter v. Cincinnati St. Ry. Co.*, 18 Ohio Cir. Ct. R. 382.

Where a child on a track was fleeing and there was reason to believe it would escape before an approaching train reached it, but its escape was prevented by catching its foot, and then everything possible was done to prevent an accident, but without success, whether the company was negligent in not stopping the train when the child was first seen was for the jury to determine. *Pennsylvania R. Co. v. Morgan*, 82 Pa. St. 134, 16 Am. Ry. Rep. 89.

It was negligence in a motorman to run over a boy whom he saw, in time to avoid the accident, walking on the track, with his back to the car, apparently oblivious of danger. *Gutierrez v. Laredo Electric & Ry. Co.* (Tex. Civ. App.), 45 S. W. Rep. 310.

The contributory negligence of a plaintiff is not a defence where an injury might have been avoided by the exercise of ordinary care. So *held*, where a girl about ten years old was killed by stopping within two feet of a track, with her back to an approaching car, but where there was nothing to obstruct her view, and it appeared that the driver might have seen her and avoided the accident. *Mallard v. Ninth Ave. R. Co.*, 15 Daly (N. Y.) 376, 7 N. Y. Supp. 666, 27 N. Y. S. R. 801.

(8) School Children.

In *Oster v. Schuylkill Traction Co.*, 195 Pa. St. 320, 45 Atl. Rep. 1006, it appeared that a motorman, when about fifty yards away, saw children in the road on both sides of the track, and very near it; that he knew that a school house was at that point: *held*, that he was bound to immediately get his car under control.

b. Absence of Negligence.

(1) Child About to Cross Track.

It is not the duty of the driver of a slowly moving horse car to stop the car immediately on seeing a child, apparently capable of taking care of itself, at a distance of eighteen feet, about to cross the track. *Lavin v. Second Ave. R. Co.*, 12 App. Div. 381, 42 N. Y. Supp. 512.

(2) Child Seen on Sidewalk.

It is not negligence in the driver of a street car to fail to bring it to a full stop upon seeing a child five or six years old upon the sidewalk. *Gannon v. New Orleans City & L. R. Co.*, 48 La. Ann. 1002, 20 So. Rep. 223.

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(3) Crossing after Being Warned.

The motorman of an electric car has the right to assume that a boy eleven years of age, who has been warned of the danger, will not attempt to cross the track in such proximity to the car that a collision between them cannot be prevented. *McLaughlin v. New Orleans & C. R. Co.*, 48 La. Ann. 23, 18 So. Rep. 703.

(4) Error of Judgment after Boy Was Struck by Car.

In *Bittner v. Crosstown Street R. Co.*, 153 N. Y. 76, 9 Am. & Eng. R. Cas., N. S., 152, 46 N. E. Rep. 1044, it was held that the company was not liable for the motorman's error of judgment while attempting to save a boy from further injury, after he had been struck down by the car.

(5) Falling upon Track.

A motorman of an electric car cannot be said to be negligent in failing to anticipate that a child running across the track one hundred feet in front of the car will stumble and fall upon the track. And it is not his duty under such circumstances to stop immediately on seeing the child. *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, 50 N. E. Rep. 277.

Where the evidence shows that a boy was killed either through his own carelessness or by a pure accident in falling in front of a street car, the company cannot be held liable in either event. *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 4 Silv. App. 380, 36 N. Y. S. R. 385, 26 N. E. Rep. 967.

In this case it appeared that the boy fell down while attempting to cross the track in front of a moving car. At the time he fell the car was not more than twenty feet distant. The place was not a crossing, and the driver applied the brake as soon as the boy fell: *held*, that the defendant was not responsible for the accident. *Earl, J.*, said: "If it be assumed that the boy fell twenty feet in front of the horses, as testified to by one of the plaintiff's witnesses, then the horses going at the usual rate of speed, assuming it to be six miles an hour, would have reached him in above two seconds, and that was all the time the drivers had to see the peril, apply the brake, and arrest the motion of the car before reaching him, and there is no evidence that, by the exercise of all the vigilance that the law requires of drivers under such circumstances, they could, after the boy had fallen upon the track, have arrested the car in time to save him from injury. If it be assumed that they saw him as he approached the track, they had the same reason to suppose that he would get across that he had; and he probably would have crossed the track in safety if he had not fallen. No negligence can be attributed to the drivers because they did not apply the brake before the boy fell, because then for the first time, the peril commenced and became apparent. This accident did not happen at a street crossing, but between the upper and lower crossings of the street, and hence the drivers did not have the same reason to expect any one there as at a street crossing. There was nothing requiring this boy to run across the track at this particular place and time. If he had walked, he probably would not have fallen, and if he had waited two or three seconds the car would have passed, and he could then have gone over the street in safety. Street railway cars have a preference in the streets, and while they must be managed with care, so as not to injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way. The unfortunate death of this boy was due to his own carelessness, or it was a pure accident, and in either event the defendant cannot be held responsible for it. The judgment should be reversed, and a new trial granted, costs to abide the event."

(6) Going Suddenly into Danger.

In *Chicago West Division R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, it was held that if a child ran on the track so suddenly that the driver has no such notice of danger as to give him an opportunity to avoid the injury by the exercise of ordinary care, the child could not recover.

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In *Rack v. Chicago City R. Co.*, 50 N. E. Rep. 668, 173 Ill. 289, it was held that the gripman of a cable car is not negligent in failing to anticipate that a small boy standing near the curb will suddenly start to run across the track immediately in front of the car, where there was nothing to indicate his intention; nor in failing to slacken speed before the boy attempted to cross.

Where a child of the age of four years (a passenger on a street-railway car) is accompanied by a person of sufficient age and discretion to take care of it, is put off the car, at the child's stopping place, by the conductor, and the person having charge of the child follows it, and both reach the street in safety, and are waiting for the passing of a car on a parallel track, the railway company is not responsible in damages if the child runs towards the passing car, strikes it, and is thrown down and injured. *Schneidau v. New Orleans & C. R. Co.* (La.), 19 So. Rep. 918.

A boy eleven years of age, standing at night on the off side of the down-town track of defendant company's street railway, waiting for a car on the up-town track (which was furthest from him) to pass, and, that car having passed, without looking up the track nearest him, to see whether or not it was safe to cross, steps on the track, twelve or fifteen feet in front of an approaching down-town car, trips and falls, is run over, and his foot crushed: *held*, that the motorman had a right to suppose the boy was waiting for his car to pass, and to expect he would remain where he was out of danger until it had passed. *O'Rourke v. New Orleans City & L. R. Co.* (La.), 25 So. Rep. 323.

In an action against a street-railway company to recover damages for the killing of plaintiff's child by defendant's car the facts appeared, by the testimony of plaintiff's witness, to be as follows: The car was moving at a moderate rate of speed on a slightly down grade, and witness was standing beside the driver, when he heard the driver shout, "look out," "hold on" or "stop." Turning, he saw plaintiff's child (a boy three years old), about six feet ahead of the car mules, and four feet from the track, and running toward the track. The driver, with his right hand on the brakes and his left pulling on the lines with such force that the tongue went up over the heads of the mules, was doing his best to stop the car. The child ran to the middle of the track, where he was overtaken and crushed by the car. The whole transaction seemed to the witness to have occurred "in a moment." There was no positive proof that the driver saw the boy at all before he hallooed: *held*, that on this state of facts the plaintiff was not entitled to recover. *Maschek v. St. Louis R. Co.*, 71 Mo. 276, 2 Am. & Eng. R. Cas. 38.

It was not the duty of a motorman to slacken the speed of his car merely because he saw a child standing in the gutter, where there was no indication of the child's intention to cross the track until the car was within ten feet of the point where it made the attempt to cross in front of the car. *Fleishman v. Neversink M. R. Co.*, 174 Pa. 510, 34 Atl. Rep. 119.

(7) Standing on Track in Apparent Defiance of Danger.

A motorman of an electric car is not bound to stop the car merely because he sees a boy eight years of age tarrying on the track apparently in boy-like defiance of danger, where it seems that he has ample time to get out of the way of the car. *Griffith v. Metropolitan St. Ry. Co.*, 66 N. Y. S. 801, 32 Misc. Rep. 289.

c. Duty to Look Out.

(1) In General.

A motorman in charge of an electric traction car moving in the public streets, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of his car. *Bergen County Traction Co. v. Heitman* (N. J.), 11 Am. & Eng. R. Cas., N. S., 286.

In *Elwood Electric St. Ry. Co. v. Ross*, 26 Ind. App. 250, 58 N. E. Rep. 536, it is said in the opinion: "It would be a harsh and unrea-

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sonable rule to hold that, because there was danger arising from operating a street-railway line, children of such tender years as to be incapable of discerning the danger incident thereto should be debarred from the use of streets under any and all circumstances. Here, then, we have a child incapable of contributing to her own injury, and a street railway charged with the highest degree of care in operating its cars as respects such child. The complaint shows a straight track, with the child in plain view of the servant in charge of the car. While there is no specific charge that he saw the child, it was his duty to see it, and use all reasonable means to avoid injuring it. In *Senn v. Railway Co.*, 108 Mo. 142, 18 S. W. 1007, it was held that reasonable care requires a driver to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such person to use all reasonable means to avoid injuring them. See *Hyland v. Railroad Co.*, 48 Hun 617, 1 N. Y. Supp. 363; *Swain v. Railroad Co.*, 93 Cal. 179, 28 Pac. 829; *Anderson v. Railway Co.*, 42 Minn. 490, 44 N. W. 518; *Railway Co. v. McDonnell*, 43 Md. 534; *Brooks v. Railway Co.*, 22 Neb. 816, 36 N. W. 529."

The court will not declare, as a matter of law, that a motoneer in charge of a car on an electric street railway, who propels it at the rate of about twelve miles an hour over a street crossing adjacent to a large public school building, when the street is filled with children just leaving school, who fails to ring the bell nearer to the crossing than one hundred and fifty feet, and who neglects to keep watch of the track ahead of him, is not guilty of gross and wanton negligence. *Consolidated City & C. P. Ry. Co. v. Carlson (Kan.)*, 7 Am. & Eng. R. Cas., N. S., 274. In this case it is said in the opinion: "A motoneer in charge of a street car may not lawfully propel it into a crowd of children—or of grown people, either—at such rate of speed as to seriously endanger persons on or about the track. It would be difficult to conceive a more reckless act than that of driving a street car at the rate of twelve miles an hour into a swarm of school children just as they are leaving school. This would be so even if the bell were continuously sounded. In this case it appears that the bell was rung at the alley, about one hundred and fifty feet away from the boy; but several of the children, who were near him, testified that they did not hear it. There is also testimony tending to show that the motoneer was not keeping watch of the track in front of him, but that his attention appeared to be directed to one side. All these circumstances, taken together, were ample to warrant the jury in finding that he was guilty of gross negligence amounting to wantonness."

In *Passamaneck v. Louisville Ry. Co.*, 98 Ky. L. Rep. 763, 32 S. W. Rep. 620, it is said in the opinion: "Persons operating street cars along the public streets of a city must know, and in law are bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It was the duty of appellee's servant or agent to be on the lookout, and to take all reasonable measures to avoid injuries to persons who might be upon the street. To be on the watch is no more than ordinary care under such circumstances. If the driver of the car could have discovered the presence of the child on the track, by proper care and diligence, in time to have avoided the injury, it was his duty to do so. If he failed to do this, then the contributory negligence of the parents, if they were guilty of any, was canceled by the negligence of appellee's servant. A greater degree of diligence and caution must be observed in controlling the movements of street cars, to prevent injuries to children, than is required for the safety of adults not laboring under disabilities. *Booth, St. Ry.* § 310. Other authorities could be cited upon the question."

Contributory negligence of a child killed by a street-railroad car will not prevent a recovery if the driver of the car could, by the exer-

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cise of reasonable care, have seen the child and avoided injury. *Pearson v. Union R. Co.*, 14 Mo. App. 579.

(2) Assumption That Child Was Seen by Motorman.

In an action for running over a child, where it appears that the track was straight and the view unobstructed, it will be assumed, in the absence of evidence to the contrary, that the motorman saw the child in time to avoid the collision. *Elwood Electric St. Ry. Co. v. Ross* (Ind.), 58 N. E. Rep. 535.

(3) Attention Must Not Be Confined to One Child.

A motorman cannot, without being guilty of negligence, confine his attention to one child alone when running his car at the rate of nineteen miles an hour. *Buente v. Pittsburg, A. & M. Traction Co.*, 2 Super. Ct. (Pa.) 185.

(4) Child Seen by Passenger.

It cannot be held, as matter of law, that the motorman of an electric car was not negligent in failing to see a child less than three years old until she was almost under the front end of the car, where it appeared that a passenger on the car saw her coming across the street before the car started. *Calumet Electric Street R. Co. v. Lewis*, 68 Ill. App. 598, 48 N. E. Rep. 153, aff'd in 168 Ill. 249.

(5) Looking Backwards at Car.

But the duty of watchfulness rests upon the driver, and proof that the driver, while looking backwards at a car which had just passed, ran over a boy, is evidence of negligence. *Collins v. South Boston R. Co.*, 26 Am. & Eng. R. Cas. 371, 142 Mass. 301.

(6) Looking towards Sidewalk.

It is negligence in the driver of a street car to look on the side of the street, instead of where he is driving, rendering the company liable for injuries to a child caused thereby. *Nugent v. Metropolitan Street R. Co.*, 17 App. Div. 582, 45 N. Y. Supp. 596.

In an action for the death of an infant, killed by being run over by a street car, one of the passengers upon the car at the time the injury occurred testified that the car was moving rapidly and that the driver was urging his mule; that witness saw the infant standing near his mother's door suddenly commence to crawl rapidly towards the track; that the child was not seen by the driver who continued to urge his mule; that witness called to the driver to look out for the child, but that the driver did not heed; that he warned the driver a second time, when the brakes were applied, but too late to avoid the accident: *held*, that an instruction to find for defendant was properly refused. *San Antonio St. R. Co. v. Cailloutte* (Texas Sup. Ct., Jan. 26, 1891), 15 S. W. Rep. 390.

(7) Darkness.

There is not sufficient evidence to charge a street-railway company with liability for the death of a little girl seven and a half years old, where the only witness of the occurrence testified that at the time the child was struck the night was dark; that persons could not be plainly seen; that the car was visible by its lights only; that as it approached the child started to run in front of it diagonally; that the driver called out to her and that she answered and was knocked down and injured, where the circumstances show that the driver was paying attention to his business and using his judgment in the manner the situation seemed to require. *Flanagan v. People's Pass. R. Co.*, 163 Pa. St. 102, 1 Am. & Eng. R. Cas., N. S., 268.

It cannot be said that the driver of a street car is guilty of negligence in failing to see, in the nighttime, at a poorly lighted place at a distance from a crossing a boy who fell upon the track a short distance from the car. *De Sota v. Metropolitan Street R. Co.*, 37 App. Div. 455, 56 N. Y. Supp. 22.

In *Dorman v. Broadway R. Co.*, 117 N. Y. 655, the action was brought for the alleged negligent killing of a boy who was run over by one of defendant's cars. Upon the trial, it appeared from the evidence that the boy attempted to cross the track in front of the car,

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while the same was moving, and that when about two feet distant from the horses he fell upon the track and was run over. There was a conflict in the evidence as to how far the deceased was in front of the horses when he first started to cross. It was shown that the distance from the horses' heads to the front wheel of the car was about nineteen feet, and there was evidence that the car could have been stopped within the distance of from fifteen to eighteen feet. The driver testified that he was standing in position against the dashboard with one hand upon the brake, and with the reins in the other, and was looking for crossers, but on account of the darkness did not see the boy. He said that he put on the brakes so suddenly that the car was stopped with a jerk. He also testified that he could not stop the car as quickly as he might otherwise, because the horses jumped over the boy, jerking the car ahead, and also, because when the boy fell he rolled over towards the car in his struggles to extricate himself: *held*, that there was no evidence that the boy came to his death from any fault or carelessness attributable to the defendant; that his death was due solely to his accidental falling upon the track, and that a judgment for the plaintiff should be reversed.

(8) Impossibility of Seeing Child in Time.

The negligence charged against the driver of a street car was in not stopping the horses before they ran over a child. There was no evidence which tended to show that at any time the child was at a place where the driver could have seen him, and then have managed the horses so that he would not have been knocked down; and it was consistent with the testimony that the child came in contact with the horses at the side, and so suddenly that the accident was unavoidable: *held*, not sufficient to show negligence, and a nonsuit was properly ordered. *Cords v. Third Ave. R. Co.*, 24 J. & S. 319, 4 N. Y. Supp. 439, 21 N. Y. S. R. 461.

The evidence tended to show that the driver of a street car was on the lookout, and kept a very close watch on the track, and all obstructions: but a child approached the car diagonally from the rear, and fell under it, and the hind wheel passed over her, killing her instantly. The driver stood on the front platform and could not see the position of the child: *held*, that he had discharged his duty and that a nonsuit was properly allowed. *Bulger v. Albany R. Co.*, 42 N. Y. 459.

In *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641, 4 Am. & Eng. R. Cas. 617, an action for the death of a child killed by a street car, the court charged that if the driver was paying attention to his horses, and had control of them and the car, and was looking out and attending to his business, and did not see the child in time to stop the car before running over her, he was not guilty of negligence, and defendant not liable: *held*, that this gave the jury a plain rule applicable to the facts of the case, and if defendant wished a fuller charge it should have requested it.

Plaintiff, an infant about seventeen months old, escaped from his mother's house, near a street-railroad crossing, went upon the track, and was struck by a train and injured. The only negligence complained of was that the engineer ought sooner to have discovered the plaintiff on the track and stopped the train. It appeared that the child reached the track but a very brief time before the accident; that the engineer immediately upon seeing the plaintiff gave the signal for applying the brakes and reversed his engine, and that everything was then done that could be done to arrest the speed of the train, but before it was entirely stopped two of the small wheels passed over plaintiff's leg: *held*, that the evidence failed to show any negligence on the part of defendant; and that a submission of the question to the jury was error. *Chrystal v. Troy & B. R. Co.*, 31 Am. & Eng. R. Cas. 411, 105 N. Y. 164, 11 N. E. Rep. 380, 6 N. Y. S. R. 833, 7 Cent. Rep. 245.

(9) Failure to Look under Car for Children, Not Negligence.

It is not the duty of the driver of a horse car to look under it before

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starting to see that children are not playing there. *Siacik v. Northern Cent. Ry. Co.*, 48 Atl. Rep. 149, 92 Md. 213.

In this case it is said in the opinion: "If the driver of a heavy wagon had occasion to stop his wagon in the street for half an hour or an hour, and a child, without his knowledge, got under the wagon and was run over, could negligence be imputed to him for not first examining to see if a child had gotten there before starting? Or, if a street car is delayed on the street for that length of time, would it be incumbent on those in charge of it to look under the car to see whether a child was there, unless there was something to show that they had cause to believe that such might be the case? And why should a driver of a team, hauling cars such as these, have any reason to suppose that a child was playing under one of the cars?"

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(*Court of Civil Appeals of Texas, Nov. 2, 1901.*)

[66 S. W. Rep. 139.]

Fires—Joint Petition.

A joint petition by an owner of property destroyed by fire, and by a fire insurance company which had paid a loss thereon, against a railroad company, for causing the fire, states a single cause of action.

Same—Parties—Joinder—Property Owner and Insurance Company.

An owner of property destroyed by fire, and a fire insurance company which has paid a loss thereon and taken a pro rata assignment of the claim for damages, may join as plaintiffs in an action against a railroad company for causing the fire.

Same—Appliances—Instructions—Harmless Error.

In an action against a railroad company for firing property, where defendant's uncontroverted evidence showed that their engines were equipped with the best appliances to prevent the escape of fire, and there was no attempt by plaintiff to show that there were any other such appliances which had the approval of scientific authority, but were not in general use, a charge requiring the company to use "the best approved appliances," though not critically correct, was not prejudicial to the company.

Same—Negligence—Sufficiency of Rebutting Testimony.*

Where plaintiff showed that the fire was caused by sparks from defendant's engine, and defendant showed the use of proper spark arresters, but did not show their condition, or that the engine was properly handled, it had not rebutted plaintiff's prima facie case; and failure to charge that defendant was bound only to use ordinary care to keep its spark arrester in good condition was therefore harmless.

Same—Liability as Affected by Use of Due Care in Selecting Employees.†

A railroad company is liable for the negligence of employees operating its engines, though it has exercised due care in appointing them.

Same—Rebuttal of Prima Facie Case.

Where plaintiff showed that the fire was caused by sparks from defendant's engines, and defendant showed the use of a proper spark arrester, but did not rebut plaintiff's prima facie case by showing the condition of the arrester or that the engine was properly handled, a charge that the burden was on plaintiff to prove that his property was fired by fire escaping from defendant's engine, and that such fire originated from its negligence, was properly refused, as tending to mislead the jury as to where the burden rested.

*See 5 Rap. & Mack's Dig. 907 et seq. ; 13 Am. & Eng. Enc. Law (2d Ed.) 503 et seq.

†See generally, 13 Am. & Eng. Enc. Law (2d Ed.) 462 et seq. ; 5 Rap. & Mack's Dig. 930 et seq.

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Same—Contributory Negligence.*

An owner of a lot is not negligent in building a house thereon and storing goods in the house, though it will be close to a railroad.

Same—Condition of Spark Arrester—Evidence.

In an action against a railroad company for firing property, testimony of a foreman in charge of its inspectors of engines that the record of inspections kept by him showed that the spark arrester of the particular engine was in good condition was properly excluded, where it appeared that he made the entry from a report handed him by a boiler maker, and it was not shown where the latter got it, or who made the inspection, or that the foreman ever saw the engine, and no reason for the nonproduction of the record itself was given.

Appeal from district court, Henderson county; John Young Gooch, Judge.

Action by P. E. Miller against the St. Louis & Southwestern Railway Company of Texas, in which the Home Insurance Company intervened, and afterwards joined with plaintiff in an amended petition. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frost, Neblett & Blanding, for appellant.

Richardson & Watkins, for appellees.

TEMPLETON, J. P. E. Miller owned a house which was situated on a lot adjacent to the cotton platform of appellant at its depot at Athens. On November 7, 1898, sparks escaped from one of appellant's engines and set fire to cotton on the platform, and the fire spread to and consumed Miller's house and a stock of goods belonging to him, and contained in the house. The greater part of the property destroyed was insured by the Home Insurance Company, and on January 30, 1899, the insurance company adjusted the loss with Miller, paying him on account thereof the sum of \$705.28; and Miller assigned to the insurance company his claim against appellant growing out of the destruction of his property through the alleged negligence of appellant, to the extent of the sum so paid to him by the insurance company. On August 23, 1899, Miller sued appellant for the damages occasioned by the fire, placing the amount of his damages at the value of the property destroyed. On May 17, 1900, the insurance company intervened in the suit, and asserted an interest in the damages which might be recovered, to the extent of the sum it had paid to Miller. On September 6, 1900, Miller and the insurance company joined in an amended petition, and together sought judgment against appellant for the value of the destroyed property; the interest of the insurance company in the alleged cause of action being stated as claimed by it in its plea of intervention. They obtained judgment for \$2,198, of which sum \$705.28 was awarded to the insurance company, and the remainder to Miller.

The demurrer of appellant to the effect that the petition

*See extensive note, 15 Am. & Eng. R. Cas., N. S., 495 et seq.; 5 Rap. & Mack's Dig. 883 et seq.; 13 Am. & Eng. Enc. Law (2d Ed.) 480 et seq.

showed a misjoinder of parties plaintiff and causes of action was properly overruled. A single cause of action was sued on, namely, that arising out of the destruction by fire, through the alleged negligence of appellant, of the property in question. An interest in the entire cause of action appears to have been assigned to the insurance company, and it was entitled to sue thereon. *Houston Direct Nav. Co. v. Insurance Co. of North America* (Tex. Civ. App.) 31 S. W. 560. Surely appellant cannot complain because Miller and the insurance company, owning, as they did, the entire cause of action, joined in a suit thereon, and did not subject it to the unnecessary expense and trouble of double litigation. The insurance company undoubtedly had the right to make itself a party to the suit and set up its interest in the subject-matter thereof.

Appellant complains of a paragraph of the court's charge which reads thus: "If you believe from the evidence that at the time of the fire the engines were properly constructed and provided with the best approved appliances for preventing the escape of fire, and that the same were, in regard to preventing the escape of fire, all in good condition and repair, and that the engines were handled and operated with ordinary care, as regarded the escaped of fire therefrom, then you will find for defendant." The complaint is that the charge incorrectly states the duty required of appellant in respect to the matters presented in the charge; its true duty being, according to appellant's contention, to use ordinary care to select and keep in repair the best approved known appliances for preventing the escape of fire. In *Railway Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638, in discussing a charge containing the expression "most approved spark arresters," the supreme court said: "We think that such a charge is less exacting than one that requires evidence of the use of the 'best engines and best appliances,' because the last-named qualifications are more a matter of speculation and opinion than the former, and may be much more difficult of ascertainment and proof. The charge would have been more satisfactory if it had limited the requirement to the use of the 'most approved' fire arresters to those that were shown to be such by their use, or if it had read, the 'most approved in use.'" The expression used in the charge there considered was not otherwise condemned or approved, and the case appears to have been decided on another ground. In 2 Wood, Ry. Law, 1343, we find the duty of the railway company in this relation announced in these terms: "A railway company, being authorized to use steam in the operation of its trains, is only bound to use ordinary care against fires, and is not liable for a purely accidental fire, caused by fire escaping from its engines. But it is bound to employ the best appliances in known use, in the form of fire boxes, spark protectors, etc., and any failure in this respect is a want of ordinary care and prudence. In most of the states, if the spark

protectors, etc., are shown to be of the most approved pattern in use, and in proper repair, it is a full defense to an action for fires set by the company, unless some negligence in other respect is shown. This rule does not require the company to use any appliances which have not been tested, although approved by the highest scientific authority, but requires only the use of those which have been tested and put into general use." Under these authorities, the expression "best approved appliances," occurring in the charge given in this case, is not critically correct, but it does not follow that its use was materially erroneous. Appellant proved by uncontroverted testimony that its engine was equipped with the best appliances in use, and there was no attempt on the part of appellees to show that there were other appliances which had the approval of scientific authority. Such being the evidence on this issue, the jury could not have interpreted the expression "best approved appliances" as requiring the use of some experimental apparatus which was not generally known, or had not come into general use. The failure of the trial court to employ the technically exact term in defining appellant's duty with reference to such appliances could not have injured appellant, and is not reversible error.

The contention of appellant that it was bound to use only ordinary care to keep its spark arresters in good repair, and was not bound absolutely to maintain them in such condition, is sound, but it does not seem that any injury could have resulted to it from the failure of the court to so instruct the jury. In *Railway Co. v. Timmermann*, 61 Tex. 663, it was held that, where the plaintiff showed that his property had been set on fire by sparks escaping from the company's engine, the burden was on the company to show that there was in fact no negligence on its part in causing the fire. This could be done by proof that the engine was equipped with the most approved arresters in general use, and that the same were in good repair, and that the engine was properly handled. In this case the appellees proved that the fire was caused by sparks escaping from one of appellant's engines, and appellant proved that the engine was equipped with a proper arrester, but did not offer any legal testimony as to the condition of the arrester at the time of the fire, or to show that the engine was carefully handled. Having failed in this respect, the prima facie case of appellees was unrebutted, and the error in the charge was immaterial.

Appellant also complains of the refusal of a special charge on this issue. We find no error in this action of the court. It is not a correct statement of the law, as announced in the requested charge, that appellant was bound only to use ordinary care in selecting competent servants to operate the engine. It was liable for the negligence of such operatives, even though it had exercised due care in appointing them. Again, the requested charge was calculated to confuse the jury

on the issue as to the burden of proof. It was stated in the special charge that the burden of proof was on plaintiffs to show that the property was fired by fire which originated from the company's engine, and that such fire originated through its negligence. Strictly speaking, this proposition is correct; but, upon the plaintiffs proving that the fire escaped from the company's engine and set fire to the property, a prima facie case was made, and the burden was shifted to the company to show that its engine was properly constructed and operated. *Timmermann's Case*, supra. In view of the evidence in this case, which has been stated above, the charge, if it had been given, was calculated to mislead the jury as to where the burden of proof rested.

It was not negligence on Miller's part to build the house on his own lot, and put his goods in the house, although the same was in close proximity to appellant's road, where engines were constantly passing. In determining whether or not it was prudent for him to do so, he had a right to assume, as stated in the court's charge, that the company could exercise ordinary care to avoid firing his property; and, if it was fired through the negligence of the company, he was entitled to recover. *Clark v. Dyer*, 81 Tex. 343, 16 S. W. 1061; *Rutherford v. Railway Co.* (Tex. Civ. App.) 61 S. W. 422.

Appellant offered to prove by R. A. Miller, its foreman at Waco, who had charge of the inspectors of engines on the Athens division, that the record of inspections in his office showed that the spark arrester of the engine in question was in good condition at the time of the fire. The record itself was not produced. It was shown that the entry was made by the witness Miller from a report handed him by a boiler maker. It was not shown where the latter got it, or who made the inspection, or that the foreman, Miller, ever saw the engine. No reason for the nonproduction of better evidence appears. The testimony was properly excluded.

There is no necessity for discussing the other assignments, which are without merit. The judgment is affirmed. Affirmed.

SAN ANTONIO & A. P. RY. CO. v. ADAMS.

(*Court of Civil Appeals of Texas, Jan. 22, 1902.*)

[66 S. W. Rep. 578.]

Sufficiency of Evidence of Origin of Fire.*

Where a fire occurred near a railroad right of way immediately after the passing of a train, and there was a strong wind blowing from the track towards the place where the fire started, and a fire had started near the same place a few days before, immediately after the passing of a train, a finding that the fire was started by sparks from the engine was supported by the evidence.

*See generally, *Southern Ry. Co. v. Williams* (Ga.), 22 Am. & Eng. R. Cas., N. S., 415, and foot-note.

San Antonio & A. P. Ry. Co. v. Adams

Fires Set by Locomotives—Rebutting Testimony.*

In an action for damages from fire communicated to adjacent grass by sparks from a locomotive, proof that the railroad company used the best spark arresters, and that the fire did not originate on the right of way, is insufficient to overcome a prima facie case by plaintiff.

Failure of Workmen Not in Plaintiff's General Employ to Extinguish Fire.

Where a fire alleged to have been communicated to plaintiff's grass by sparks from a locomotive was seen as it was starting by men who were digging a well for plaintiff, and could have been extinguished by them before it did much damage, their failure so to do did not preclude a recovery by plaintiff, the well diggers not being in his general employ

Appeal from Kendall county court; Henry Theis, Judge.

Action by William Adams against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Houston Bros. and Hines & Taliaferro, for appellant.

F. W. Schewppe, for appellee.

FLY, J. This suit originated in a justice's court, where appellee obtained a judgment for \$200 as damages for the destruction by fire of 80 acres of grass, 100 cedar posts, and 5 tons of hay. On appeal to the county court appellee recovered judgment for \$180. It was in proof that on March 13, 1899, a train belonging to appellant passed along its track near the land of appellee, and a few minutes thereafter the grass on the land was seen to be on fire near the right of way. A few days before, a fire had started in the grass shortly after a train had passed, but was extinguished. The fire destroyed the grass on about 80 acres of land, and 5 tons of hay, and 100 cedar posts. There were several men at work drilling a well, and they were using an engine, but it was not running at the time of the fire, and it was, according to one witness, 200 feet, and another, 300 yards, from where the fire originated, and it does not appear probable that the grass caught fire from that engine. It was in evidence that appellant was using the best spark arresters, but there was no evidence that the engine was being carefully and properly operated. In the case of *Railway Co. v. Levine*, 87 Tex. 437, 29 S. W. 466, it was said: "It is the established law in this state that when fire is set out by sparks from an engine on a railroad the law presumes negligence, and the plaintiff is entitled to recover for damages done by the fire so set out, unless the railroad company shall prove that its engine was provided with the best approved apparatus for arresting sparks and preventing their escape, and properly operated." This doctrine is reiterated in *Scott v. Railway Co.*, 93 Tex. 625, 57 S. W. 801, and it is further said: "But the jury might have found that the testimony of the witnesses as to the actual condition of the spark arrester was true, and yet that sparks escaped and caused the

*See *Alabama G. S. R. Co. v. Taylor* (Ala.), 21 Am. & Eng. R. Cas., N. S., 135, and foot-note, 136.

Kelsey *et ux.* v. New York, N. H. & H. R. Co

fire, and that this was due to the negligent management of the engine; or they might have found that sparks escaped and caused the fire through negligence, the exact character of which, whether in defective appliance or careless handling of the engine, they could not ascertain." The special charges asked by appellant and refused by the court were clearly erroneous, because, by their terms, proof that appellant used the best and most-approved spark arresters, and that the fire did not start on the right of way, was a perfect defense to the *prima facie* case made by appellee, without reference to the manner in which the engine was operated.

It is contended by appellant that there was no evidence tending to establish that sparks from its engine ignited the grass. It was in proof that a fire had occurred immediately after appellant's train passed, that a strong wind was blowing from the road towards the grass, and a fire had occurred two days before near the same place just after appellant's train had passed, and these circumstances would be sufficient to justify a conclusion that the fire was communicated by the train. *Railway Co. v. Holt*, 1 White & W. Civ. Cas. Ct. App. § 836; *Railroad Co. v. Hart*, 2 Wilson, Civ. Cas. Ct. App. § 419. The *Holt* Case is approved in *Railway Co. v. Timmermann*, 61 Tex. 660.

The men who were digging the well and saw the fire at its inception, and who testify that they could have extinguished it before it did much damage, were not in the general employ of appellee, and he cannot be responsible for their conduct, however reprehensible, in failing to extinguish the fire.

The judgment is affirmed.

KELSEY *et ux.* v. NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Hampden, March 3, 1902.*)

[63 N. E. Rep. 8.]

Frightening Team—Sounding Whistle under Bridge—Negligence.*

Where no part of a highway crossing a railroad on an overhead bridge was visible from the railroad, except the bridge, and it is not shown that an engineer saw plaintiff's vehicle before sounding the whistle under the bridge, the sounding of the whistle is not sufficient proof of negligence.

Same—Same—Defective Construction of Bridge—Proximate Cause.

Where in an action against a railroad company for injuries caused by the frightening of plaintiff's horse by steam ascending through the cracks in the floor of an overhead bridge, it appears that the floor was not defective, the fact that defendant did not strictly comply with the commissioner's orders in other particulars cannot render it liable, without evidence that such noncompliance was the cause of the accident.

Exceptions from superior court, Hampden county; P. Pierce, Judge.

*See generally, preceding case, and foot-note.

Kelsey et ux. v. New York, N. H. & H. R. Co

Two actions by Kelsey and wife against the New York, New Haven & Hartford Railroad Company. On the death of plaintiffs, their administrator was substituted, and the cases were consolidated with two actions by the administrator. There was a judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Green & Bennett, for plaintiff.

Walter S. Robinson, for defendant.

LATHROP, J. These are four actions of tort. The first two are for injuries sustained by the plaintiffs while living, and which since their death are prosecuted by their administrator. The last two are brought by their administrator to recover for their death. The four cases were tried together, and at the close of the evidence the presiding judge directed the jury to return a verdict for the defendant in each case; and the cases are before us on the plaintiff's exceptions.

The record is a long one, as it contains all the evidence introduced at the trial, but we think that the facts, so far as the questions of law are involved, may be briefly stated. The plaintiffs in the first two cases were husband and wife. Late in the afternoon of June 2, 1900, they started to drive from Westfield to Holyoke in an open wagon, drawn by one horse. With them were two of their children,—a boy of 14 and a girl of 13. Some miles out from Westfield, while crossing a bridge over the railroad of the defendant, the horse was frightened and ran. The wagon was overturned, the persons inside were thrown out, and the plaintiffs in the first two cases sustained injuries from which they died in the following month.

The first count in each of the two cases is for negligence in sounding the whistle of a locomotive engine under the bridge upon which the plaintiffs were passing. We assume, for the purpose of the case, that there was evidence that Mr. Kelsey was in the exercise of due care, and that the horse was frightened by the sounding of the whistle. The question remains whether there was evidence that the defendant was guilty of negligence in blowing the whistle. The bridge was not in a thickly settled neighborhood, but in a wild, rocky country. There was a stone quarry near by, and there were a few houses along the highway, at some distance apart,—none near the bridge. The highway as it approaches the bridge from Westfield runs nearly parallel with the railroad, then it makes a sharp turn to the right a short distance from the bridge, and after crossing the bridge runs in a straight line about 30 feet, and then turns sharply to the left. The place where the wagon was overturned was about 25 feet from the bridge. The bridge itself was 20 feet wide, and 22 feet 6 inches long between the abutments, and the distance from the top of the rails to the bottom of the planking of the bridge was 18 feet 9½ inches. The railroad could not be seen from the highway until the bridge was reached, nor could any part

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of the highway be seen from the railroad, except the bridge. When the train was first seen by the occupants of the wagon, the tender of the locomotive engine was just going under the bridge. There is no evidence in the case that the engineer of the locomotive engine saw the horse and wagon before the whistle was sounded, or had any cause to suppose that when it was sounded there was a horse upon the bridge. The train of 15 freight cars was going towards Westfield at the rate of 28 or 30 miles an hour, down grade, steam being shut off, and the horse went over the bridge at a good rate of speed; and it is obvious that the opportunity for seeing a horse and wagon on the bridge was very brief. It cannot be said, then, that there was anything wanton or reckless in sounding the whistle. The rules of law which govern this case are well settled. In *Favor v. Railroad Corp.*, 114 Mass. 350, 19 Am. Rep. 364, it was held that, where the horse of a traveler upon the highway was frightened by the noise of a train passing upon an overhead bridge, the traveler could not recover for injuries resulting from the fright of the horse. The same rule was applied in *Lamb v. Railroad Co.*, 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449, where a horse, on a highway running parallel to the railroad, was frightened by the smoke coming from the locomotive, caused by adding coal to the fire, if such act at that place was necessary in the ordinary running of the train, and that it was not the duty of those on the engine to be on the lookout for travelers on the highway who might be endangered by such act. So it was held in *Howard v. Railroad Co.*, 156 Mass. 159, 30 N. E. 479, that steam escaping from the safety valve of a dummy engine lawfully upon the streets of a city, and frightening a horse, did not show negligence on the part of the railroad company. If, however, the sound of a whistle is unduly prolonged when the train is not in motion, and the engineer sees horses 70 feet off, this may be found to be negligent. *Flynn v. Railroad Co.*, 169 Mass. 305, 47 N. E. 1012. It was, however, said in this case, "The engineer and conductor were not bound, before giving the signal, to look and see if there were any persons on the highway." The burden of proof was upon the plaintiffs to show that not only was a whistle sounded, but that the sounding was negligent. While there was evidence that there was no whistling post near the bridge, nor a station near by, the plaintiffs should have gone further, and shown that there was no occasion for a whistle to be sounded. Where a railroad and a highway cross each other at different grades, there is no presumption of negligence in sounding a whistle on an overhead bridge, or in sounding it under a bridge over which passes a highway. *Railway Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; *Farley v. Harris*, 186 Pa. 440, 40 Atl. 798. We are of opinion that, under all the circumstances of this case, there was no sufficient evidence of negligence on the part of the defendant in blowing the whistle.

The second count in each declaration in the first two cases alleges that the bridge was defective, and that the horse was frightened by steam from the whistle and the smokestack coming up through cracks in the flooring of the bridge. One witness testified that some of the planks, he should judge, were three-eighths of an inch apart, or more. Another witness was asked how much the planks were open, and answered: "Well, I couldn't say. Somewhere in the neighborhood of half an inch, I should judge." There was evidence that steam came up through the cracks and over the sides of the bridge. There was very slight evidence that the steam coming through the cracks had anything to do with frightening the horse. But it is not necessary to consider this, as we are of opinion that the evidence does not show any defect in the bridge. The cracks were slight, and such as might be expected to exist in an open bridge with a plank floor. Moisture would swell the planks and make them approach each other, and dry weather would shrink them and cause them to recede. There was no testimony in the case to show that the bridge was not built in exact accord with the orders of the county commissioners, but the plaintiffs' counsel has called our attention to the fact that the order of the county commissioners contains the following requirement: "Whenever a bridge is covered with plank, the top of the planking must be at grade, and a stick of chestnut timber, ten inches on the bottom and inside, and sloping to eight inches on the outside thereof, must be firmly imbedded upon each side of the bridge, for securing the edges of the plank from any injury from wheels in their passage to and from said bridge." The counsel contend that certain photographs put in evidence at the trial, and which are before us, show that these timbers were not put in. This is apparently so, but the object of the requirement was to protect the ends of the planks, and the photographs show that the planks extend beyond the railing on each side of the bridge, and were therefore not exposed to injury. But if the defendant did not strictly comply with the order of the county commissioners in respect to the timbers, there is nothing to show that such noncompliance was in any way the cause of the accident.

As we have found that there was no sufficient evidence of negligence on the part of the defendant in the first two cases, it follows that the plaintiffs in the last two cases, whether they are brought under St. 1898, c. 565, or Pub. St. c. 52, § 17, as contended by the plaintiffs, or under the latter statute alone, as contended by the defendant, cannot maintain their actions for the death of their intestates.

The order in each case must be: Exceptions overruled.

TEXAS & P. RY. CO. v. HAMILTON *et al.**(Court of Civil Appeals of Texas, Dec. 21, 1901.)*

[66 S. W. Rep. 797.]

Frightening Mule—Signals—Sufficiency of Evidence of Negligence.

Decedent and others were riding mules on a public road alongside defendant's railroad tracks, about 30 yards distant. A train came up from behind, and, when about 300 yards away, whistled for a flag station, and also in response to the conductor's signal to stop. There was positive evidence that the engineer, when opposite decedent and his companions, saw them, smiled, gave 10 or 12 blasts on the whistle, and let off a volume of steam. Decedent's mule was frightened, and threw him. Defendant's evidence tended to show that only the customary signals were given: *held* to support a verdict against the company.

Same—Same—Instructions.*

A charge that if the engineer saw decedent, and sounded the whistle and let off steam in order to frighten the animal, or with reason to believe that the animal would be frightened, defendant would be liable; that if he did not see decedent, or if only the customary signals were given, or if unnecessary noise was made without intention to frighten the animal, and without reason to believe that it would be frightened, defendant would not be liable,—was as favorable to defendant as it could ask.

Same—Contributory Negligence.

The evidence showed that the mule was of average docility; that it manifested some signs of uneasiness when it discovered the train, but was controlled by its rider until the unusual noises just opposite it; that the saddle turned when it jumped out of the road, but it did not appear that the saddle was defectively fastened: *held* not to show contributory negligence, as matter of law, on decedent's part, in failing to dismount from the mule.

Same—Same—Instructions.

An instruction that if decedent knew the train was approaching in time to have taken such action to avoid injury as a person of ordinary prudence would have done, and failed to do so, and such failure contributed to the injury, the company was not liable, was a sufficient charge on contributory negligence, in the absence of correct charges asked by defendant.

Instructions.

A charge requiring a verdict for defendant, regardless of whether such facts caused or contributed to the injury, was properly refused.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by Lela Hamilton and others against the Texas & Pacific Railway Company. Judgment in favor of certain plaintiffs, and defendant appeals. Affirmed.

W. T. Armistead, for appellant.

F. M. Ball, for appellees.

*As to whether a railroad company is liable for injury resulting from malicious conduct of its employees in frightening teams, see *Proctor v. Southern Ry. Co. (S. Car.)*, 22 Am. & Eng. R. Cas., N. S., 426, and note, 440 et seq.

As to the liability for frightening horses by giving crossing signals, see *Gulf, C. & S. F. Ry. Co. v. Milner (C. C. A.)*, ante, 607, and foot-note.

Liability where horses are frightened by usual and necessary noise, see *Central of Georgia Ry. Co. v. Black (Ga.)*, 23 Am. & Eng. R. Cas., N. S., 864, and foot-note.

Texas & P. Ry. Co. v. Hamilton

TEMPLETON, J. This suit was brought by the father, mother, wife, and children of Hovace Hamilton to recover damages sustained by them on account of his death, which was alleged to have been caused by the negligence of the Texas & Pacific Railway Company. A jury awarded the wife and children the sum of \$2,000, and the company has appealed.

Hamilton lived in Bowie county, a short distance west of Oak Grove, a flag station on appellant's road. The town of Dekalb, one of appellant's regular stations, is situated eight or ten miles east of Oak Grove. A public road runs from Dekalb to Oak Grove and points beyond. The dirt road lies north of the railroad track, and runs approximately parallel with it, being distant therefrom at the place of the accident about 30 yards. The track and right of way are fenced, and the public road is outside the inclosure. On the day he was killed, Hamilton went from his home to Dekalb in company with one Stuart. After transacting their business at that place, they started to return home. One Lacy was with them, and they were all riding mules. When they reached a point above one-fourth mile east of Oak Grove, a regular passenger train of appellant passed them, going west. Hamilton's mule became frightened, ran away, threw him off, and killed him. Hamilton and his companions were in the public road, which at that point slightly inclined toward the railroad track as they advanced. When the train was about 300 yards from and behind them, the usual whistle for the station was sounded. There were passengers on board for Oak Grove, and the conductor, by pulling the bell cord, notified the engineer of the fact; and he, to let the conductor know that he had received the notice and would stop at the station, again sounded the whistle. Hamilton and those with him heard the signals and continued to ride on, Hamilton being in front. There was direct and positive evidence to the effect that when the train was about opposite Hamilton the engineer looked at and saw him and his companions, smiled, laughed, and gave 10 or 12 short, sharp, quick blasts of the whistle, and let off a volume of steam in their direction; that thereupon Hamilton's mule became unmanageable, dashed out of the road, and threw him off. On the other hand, there was testimony tending strongly to establish the facts that only the customary signals were given, and no unusual noises were made, and that the engineer never saw Hamilton and his companions. In this state of the evidence, the finding of the jury upon these controverted issues of fact is conclusive, and the contention of appellant that the evidence is not sufficient to support the verdict in these particulars cannot be sustained.

The court charged the jury, in substance, that if the engineer saw Hamilton, and sounded the whistle and let off the steam for the purpose of frightening the animal he was riding, or if he saw Hamilton and sounded the whistle and let off the steam unnecessarily, knowing or having reason to believe that

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the doing so would probably frighten his mule and cause Hamilton to be injured, then appellant would be liable for the consequences of such uncalled-for and unjustifiable acts of its servant. In submitting appellant's theories of the case, the court instructed the jury that if the engineer did not see Hamilton, or if only the customary signals were given and the usual noises made, or if unusual and unnecessary noises were made, but there was no intention to thereby frighten Hamilton's mule and injure its rider, and the engineer did not know or have reason to believe that the effect of such noises would be to frighten the mule and injure Hamilton, then, in either event, appellant would not be liable. Appellant was not entitled to more favorable instructions on these issues, and its complaints as to these charges are not well taken. *Hargis v. Railway Co.*, 75 Tex. 19, 12 S. W. 953; *Railroad Co. v. Traub* (Tex. Civ. App.) 47 S. W. 282; *Railroad Co. v. Moseley* (Tex. Civ. App.) 58 S. W. 48.

Appellant insists that Hamilton was guilty of contributory negligence in not dismounting from his mule when he became aware of the train's approach, because the mule was wild and unmanageable, and his saddle was not securely fastened on. The evidence shows that the mule was of average docility and gentleness, and that the saddle turned when the mule jumped out of the road, but does not show that the saddle was caused to turn by reason of its being defectively fixed on the mule. The evidence further shows that the mule manifested some signs of uneasiness when it discovered the coming train, but was controlled by its rider until the unusual and unnecessary noises were made just opposite to it. Such being the evidence, the court would not have been authorized to hold, as a matter of law, that Hamilton was guilty of contributory negligence in not dismounting from his mule, and we would not be justified in disturbing the finding of the jury upon that issue. The court instructed the jury that if Hamilton knew that the train was approaching in time to have taken such action to avoid injury to himself as a person of ordinary prudence would have taken under like circumstances, and failed to do so, and such failure caused, or contributed to cause, his injury, then the plaintiffs could not recover. This was a sufficient charge on the issue of contributory negligence, at least in the absence of correct charges asked by appellant. The special charges requested by appellant in respect of this matter were erroneous, because (1) they required a verdict for the defendant regardless of whether the facts to be found caused or contributed to cause the accident; and (2) they declared that the facts stated amounted to contributory negligence, when it was a question of fact for the jury to determine, under all the evidence, whether, if such facts existed, an ordinarily prudent person would have acted as Hamilton did.

We find no error in the record, and the judgment is affirmed. Affirmed.

Louisville & N. R. Co. v. Penrod's Adm'r

On Rehearing.

(Jan. 11, 1902.)

In its motion for rehearing, appellant complains that we erred in approving that paragraph of the court's charge wherein the jury were authorized to find for the plaintiffs if they believed that the engineer sounded the whistle intentionally for the purpose of frightening Hamilton's mule. The contention is that the charge is in conflict with the rule of law announced by the supreme court in the Cooper Case, 88 Tex. 607, 32 S. W. 517, and by this court in the Yarbrough Case, 39 S. W. 1096. The objection now urged to the charge was not presented by any assignment of error, and was not passed on by us. Appellant not only did not present its contention in respect to this issue in the lower court, but it there, by special charge, urged the opposite contention,—that it was not liable unless the whistle was intentionally sounded.

The objection comes too late to be considered, and the motion for rehearing is overruled.

LOUISVILLE & N. R. CO. v. PENROD'S ADM'R.

(*Court of Appeals of Kentucky, March 7, 1902.*)

[66 S. W. Rep. 1013.]

Accident at Crossing—Failure to Give Signals—Instructions.

Defendant railroad company cannot complain of an instruction authorizing the jury to find for plaintiff administrator if they believed the death of his intestate was caused by the failure to give timely warning by whistle or bell "or other suitable signals" of the approach of a train to a street crossing, though no other signal could have been given than by the sounding of the whistle or bell.

Same—Frightening Team—Customary Noises.*

It is negligence to make the customary noises incident to the movement of a train where the servants in charge have reason to apprehend injury therefrom to the driver of a team near the track, whose perilous position they have discovered, unless it is reasonably necessary to do so for the protection of the property and lives in their charge.

Instructions.

Appellant cannot complain of an erroneous instruction given on motion of appellee, where he asked an instruction of the same import.

Same—Punitive Damages.

In an action to recover damages for a death alleged to have resulted from the failure to give a signal of the approach of a train to a crossing an instruction as to punitive damages was proper, the degree of the negligence, if any, being for the jury.

Second Appeal—Law of the Case.

Upon a second appeal the opinion of the court on the former appeal is the law of the case.

Du Relle and O'Rear, JJ., dissenting.

Appeal from circuit court, Hopkins county.

"Not to be officially reported."

Action by the administrator of John Penrod against the

*See preceding case, and foot-note.

Louisville & N. R. Co. v. Penrod's Adm'r

Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

For former report, see 56 S. W. 1.

Gordon & Gordon, E. W. Hines, and B. D. Warfield, for appellant.

C. J. Waddill, for appellee.

PAYNTER, J. This is the second appeal in this case. 56 S. W. 1. On the former appeal the court held that under the petition the plaintiff, if entitled to recover at all, could only do so because there was negligence in letting off steam or blowing the whistle, thus causing the team to take fright and run away. It held that the petition did not authorize the question to be submitted to the jury as to whether the train came up quietly, and without proper signals of its approach, so that the driver was without warning of the danger; but held that on the return of the case an amendment should be permitted to be filed embodying such averments. The plaintiff filed an amendment in which it is averred that, in addition to the negligent acts set forth in the original petition and amendment, and as concurrent acts of negligence, the defendant's agents and servants in charge of the engine and train negligently caused the same to run within the city, and to approach Broadway street crossing and the place where the decedent and his team were, slowly, quietly, noiselessly, and without ringing a bell or sounding of a whistle, and without giving any signal or warning of any kind; that the train was an extra freight, coming from the north, some 10 minutes before a passenger train was due from the south; that it came in unexpectedly, and not on schedule time; that it ran through the city without ringing a bell, or sounding the whistle, or giving any signal of its approach; that it ran to Broadway street, in close proximity to the decedent and his team, with steam shut off, without giving any warning by bell or whistle or otherwise; that it stopped near the decedent and his team, when it negligently sounded its whistle, and emitted great quantity of steam, with the knowledge at the time and prior thereto on defendant's part of the presence and peril of the decedent; that the negligent acts stated caused the team to take fright and run away, whereby the plaintiff's intestate was instantly killed. Several witnesses were introduced, who did not testify on the former trial, whose testimony tended to support the averments that the train did not give any signal or warning of its approach to the city or at the station or the Broadway street crossing; that it drew up near to Broadway crossing, near which the plaintiff's intestate was unloading coal from a wagon to which the horses were attached; that upon stopping the engine gave some loud whistles, and let off a great quantity of steam, and began to back, thus causing the horses to run away. There was some testimony tending to

show that some of those in charge of the engine were looking out in such a way that they could not have helped seeing the position of the decedent, and therefore made themselves aware of his perilous position, if it was so.

Under the instructions of the court, the jury was not authorized to find for the plaintiff, because of any noise, usual or unusual, in blowing the whistle or in letting steam escape. The court gave eight instructions. Nos. 1 and 8 on motion of the plaintiff, 2 and 4 on its own motion, 3, 5, 6, and 7 on motion of the defendant. Under instruction No. 1 the jury could only find against defendant if it believed from the evidence that the defendant failed to give reasonable and timely warning by ringing its bell, or sounding its whistle, or by giving other suitable signals of its approach to the Broadway street crossing, and that, if the death of Penrod resulted from such failure, it could not so find if he knew or had reason to know of the train's approach to the crossing in time to have saved himself by the exercise of ordinary care for his own safety. It is urged that the words "other suitable signals" should not have been in the instruction, as there was but two ways to give warning of the train's approach, and that was by bell or whistle. The instruction follows the language of the former opinion with reference to the method to be employed by those in charge of the train in giving warning of its approach. If the words in question had any effect one way or the other, their use was beneficial to the defendant, because, under the instruction, if the train gave any kind of suitable signals, whether by bell, whistle, or otherwise, it was not guilty of negligence. No. 2 is criticised because it is claimed that it assumes that Penrod's peril was discovered by those in charge of the train, and that it assumed that a recovery might be had "if any person on the train saw Penrod's peril." It is therefore criticised because it is claimed that it assumed that there may have been some other care for the safety of Penrod which the servants of the train might have used in addition to giving the signals of the approach of the train. As we understand the instruction, there is no assumption of fact in it. The facts upon which the instruction was predicated were not assumed, but the question as to whether they existed was submitted to the jury. The use of the words, "agents or servants in charge of the train," in the instruction, are such as are usually employed in instructions in cases like the one under consideration. These words were used in the instructions which the court gave on its own motion, and were substantially used when necessary in the instructions offered by the plaintiff and defendant. The words "defendant's agents and servants" are used in No. 5 given on motion of defendant. When the court said in the instruction, "failed to give any signals of warning of its approach," it certainly did not prejudice the rights of defendant, because the jury under that instruction could not have found that the defendant was guilty of negligence if it gave any signals. Over the objection of

the parties, the court gave instruction No. 4, which reads as follows: "The court instructs the jury that defendant's agents or servants in charge of the train had the right to make the usual and customary noises and proper and necessary signals incident to the movement of the train; and if the jury believes from the evidence that said horses took fright, which caused the loss of Penrod's life, by the acts of defendant's agents or servants in blowing the whistle or causing the escape of steam, they must find for the defendant if they believe from the evidence that said blowing of the whistle and escape of steam was usual, necessary, and proper in the handling and movement of the train, unless they further believe that said agents or servants at the time saw or knew the perilous position of Penrod, if perilous, and had reason to apprehend that injury would result to him if such noises or signals were made; in such case said signals and escape of steam was improper, unless same was then necessary, or reasonably necessary, for the protection of the property and lives in their charge."

Before instruction No. 4 was given by the court, the appellant offered a series of instructions, among which is "F." It reads as follows: "The court instructs the jury that the defendant's agents or servants in charge of the engine had the right to make the usual and customary noises and proper and necessary signals incident to the movement of the train, and if the jury believe from the evidence that said horses took fright, *ran away, and thereby caused the death of John Penrod*, by the acts of defendant's agents or servants in blowing the whistle or causing the escape of steam, they must find for the defendant if they believe from the evidence that said blowing of the whistle or escape of steam was usual, necessary, and proper in the handling and *management* of the train, unless they should further believe *from the evidence* that said agents or servants at the time saw or knew the perilous position of Penrod, if perilous, and had reason to apprehend that injury would result to him if such noises or signals were made. In *such* case *such* signals and escape of steam were improper, unless same were necessary, or reasonably necessary, for the protection of the property and lives in their charge." The underscoring is ours, and which suggests the words which are used in that which are not used in the other. The instructions are practically the same. The change in the phraseology had not invited criticism from counsel for appellant. This instruction was given for the benefit of the appellant, and to present the view of the law which was expressed by it in instruction "F," which it offered. In it the court told the jury that those in charge of the train had the right to make the usual and customary noises and proper and necessary signals incident to the movement of the train; and, although those in charge of the train may have seen and known of the perilous position of Penrod, and had reason to apprehend that injury would result to him if such noises or signals were made, still they had the right to make them with such knowledge if it

was necessary or reasonably necessary for the protection of the property and lives in their charge. If they discovered his perilous position, and had reason to apprehend that injury would result to him if such noises or signals were made, it was negligent to do so, unless it was necessary, or reasonably necessary, for the protection of the property and lives in their charge. This is the law, because, if those in charge of the train should discover the perilous position of one riding or driving a frightened horse, and then would unnecessarily blow the whistle or ring the bell, and thus cause it to run away, it would certainly be gross negligence on their part. This was the idea which the court and attorneys for appellant had of the law when the case was tried. It is a well-settled rule that, although the court may have given an erroneous instruction, still, if the complaining party offered one of the same import, this court will not reverse the case because of the erroneous instruction. *First Nat. Bank v. Germania Safety Vault & Trust Co. (Ky.)* 66 S. W. 716; *Insurance Co. v. Hughes' Adm'r (Ky.)* 60 S. W. 850.

The question of contributory negligence was fully submitted by instructions Nos. 5 and 7. Instruction No. 7 was given by reason of the former opinion in this case. It is insisted that the court erred in giving instructions authorizing the jury to award punitive damages. In response to this we quote *Eskridge v. Railroad Co.*, 89 Ky. 367, 12 S. W. 580, where the court said: "It is the policy of the law, as has been often held by this court, to treat the duty of those in charge of a railroad train to give timely and sufficient warning of its approach to the crossing of a public road as imperative, and a failure to perform it is in legal contemplation negligence, the degree of which depends upon the facts and circumstances of each case, to be determined by the jury." In the former opinion this court expressly said that the plaintiff might file an amended petition containing the averments alleging the ground upon which a recovery was based in this action. The pleadings and proof make such a case for the jury as this court said should be submitted to it, and which was done. The opinion is the law of the case, whether or not it correctly announced the rule which should govern. The doctrine of *stare decisis* should be respected in this as in other cases. When the facts authorize the submission of a case like this to a jury, this court has no more right to say what the verdict should be than the jury has to say to this court what principles of law should be applied by it to the facts submitted in evidence. The only seeming qualification to this general principle is that the court may set aside the verdict when it is flagrantly against the weight of the evidence, or grant a new trial where the verdict is so excessive as to indicate it was given as a result of passion or prejudice. For none of these reasons can we say that the appellant is entitled to a new trial.

The judgment is affirmed.

DU RELLE and O'REAR, JJ., dissenting.

TEXAS MIDLAND R. R. v. CARDWELL.*(Court of Civil Appeals of Texas, Dec. 21, 1901.)*

[67 S. W. Rep. 157.]

Frightening Horses—Engine at Crossing Emitting Steam.*

Where a railroad company knowingly and unnecessarily allowed one of its engines to remain, without attendants and with steam up, at a public street crossing, and partly in a much-traveled street, knowing that it was liable to blow off steam, and thus cause unusual noise, calculated to frighten animals driven over the street, it was guilty of negligence.

Same—Same—Contributory Negligence.

Plaintiff, who was driving a gentle horse, attempted to cross defendant's railroad tracks at a regular street crossing, near which an engine had been left standing partly in the street, without attendants, and with the steam up. Plaintiff stopped, thinking the engine might start; but seeing that it was not going to move, and that another team was passing, and knowing that it was about time for a passenger train, he started to drive across. When nearly opposite the engine, it began to blow off steam, frightening his horse, and causing it to run away: *held*, that plaintiff was not guilty of contributory negligence.

Same—Same—Same.

In the absence of anything to show that plaintiff knew that the engine was liable to blow off steam, he could not be held to have assumed the risk.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Action by A. F. Cardwell against the Texas Midland Railroad. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. W. Ogden, A. H. Dashiell, and Perkins, Gilbert & Perkins, for appellant.

Sherrill & Hefner and Evans & Elder, for appellee.

BOOKHOUT, J. This is a suit instituted by appellee against appellant, Texas Midland Railroad, to recover damages for personal injuries inflicted upon him on the 20th day of October, 1897, by reason of a horse which was being driven by appellee becoming frightened at a locomotive engine belonging to appellant, which engine was left, without any one in charge of it, with steam up and fire burning, upon defendant's track, partly in Lee street, in the city of Greenville, across which street defendant's track ran. Defendant answered by general and special demurrer, general denial, plea of statute of limitations of two years, and specially pleaded contributory negligence on the part of appellee. A trial resulted in a verdict and judgment for appellee, and the defendant has prosecuted an appeal.

Conclusions of Fact.

On the 20th day of October, 1897, appellee, who lives about five miles east of Greenville, visited the city of Greenville on business. He was traveling in a buggy drawn by a gentle

*See generally, preceding case, and foot-note.

mare. He started home on Lee street,—a public street of said city, running east and west. This street is crossed by appellant's railroad track. When appellee approached within about 150 feet of the crossing, he saw the engine belonging to appellant, partly in Lee street, with steam up and no one in charge of it. He stopped a few minutes, thinking the engine might start up. Seeing that it was not going to move, and that another team was passing, and knowing that it was about time for a passenger train, he started to drive across. His horse was one that he had raised, and was gentle. When he got nearly opposite the engine, it began to pop off steam. The noise was unusual, and caused the animal driven by appellee to become frightened and to "run backwards," whereupon appellee slapped her with the line. The animal became unmanageable, circled to the left, and ran against a post standing on the left side of the street, throwing appellee out and injuring him. Lee street is 60 feet wide. The engine was standing on appellant's track, and extended 10 or 12 feet into Lee street, which is a public street, and very much traveled. In the center of Lee street, where it crosses the railroad track, there are some planks by the side of the track, and between the rails thereof, put there to enable vehicles to cross the track. The north end of the engine was within 8 or 10 feet of these planks. In deference to the jury, we conclude that the appellant was guilty of negligence in leaving the engine, with steam up and fire burning, without any one in charge, partly in Lee street,—a public street of the city,—knowing at the time that an engine left with steam up and fire burning was liable to pop off steam and produce unusual noises, calculated to frighten animals driven along and over Lee street; that, as a result of said negligence, appellee was injured, and thereby sustained damages in the amount found by the jury; that appellee was not guilty of contributory negligence.

Conclusions of Law.

1. It is contended that the court erred in overruling the defendant's general and special exceptions to the petition because said petition fails to allege any act of negligence on the part of defendant which would render it liable for the injuries complained of. The substance of the allegations contained in appellee's second amended petition, upon which he went to trial, is: First. That an engine belonging to and operated by defendant was negligently left standing on and across a public street in the city of Greenville (said street being a highway over which a great many people traveled daily), and at a place where a great many people traveled with teams and vehicles; said engine being at the time fired, heated, and ready for use, and no one left in charge of the same. Second. That said engine was unsightly in appearance, and calculated to frighten ordinarily gentle horses when left standing on and across said street, and near the traveled portion thereof, where it was necessary for teams traveling along said street to go near the

same, and that these facts were known to defendant. Third. That, when plaintiff had reached a point nearly opposite said engine, the steam suddenly escaped therefrom, making a loud, hissing, and unusual noise, which frightened his horse, and caused it to become unmanageable and to run away, etc. These allegations set forth a good cause of action. The petition does not show that appellee assumed the risk in attempting to cross the track with knowledge that the engine was partly in the street, with steam up; nor does it show affirmatively that it was the result of his own negligence. It does not appear that the plaintiff had any knowledge that an engine so left was liable to produce unusual noises. *Railroad Co. v. Traub* (Tex. Civ. App.) 47 S. W. 282; *Same v. Jones* (Tex. Civ. App.) 35 S. W. 322; *Railroad Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; *Thomp. Neg.* (2d Ed.) §§ 1915-1917.

2. It is contended that the court erred in refusing to give a special charge requested by appellant, instructing a verdict for defendant. It is insisted under this contention that there was no evidence of any act of negligence on the part of the defendant which rendered it liable in damages for the injuries sustained by plaintiff. There is evidence showing that if an engine is left standing, with steam up and fired up, when the heat gets beyond a certain point it will pop off steam, and if it does not do so it is liable to explode. When appellee approached the crossing, the engine was escaping steam. When he got nearly opposite, and within about 25 feet of the engine, the popping-off noise began. The horse became frightened at this noise, and began to back. The noise could have been controlled by the engineer by drawing the fire when he left the engine, or by injecting cold water in the boiler. The noise was unusual. The evidence does not disclose that there was any necessity for leaving the engine at that particular place, partly in the street, with steam and fire up. Under these facts, the leaving of the engine partly in Lee street,—a much traveled street,—in the condition of this engine, knowing that it was liable to pop off steam, and thereby cause an unusual noise, calculated to frighten animals driven along and over said street, was negligence, for which appellant was liable. It is argued that the undisputed proof shows that the steam escaped in the usual manner, through the automatic safety valve, and hence there was no proof of negligence on the part of defendant. The defendant had the right to operate its engine in a lawful manner over and across Lee street, and would not be liable for the escape of steam in the usual way, through the proper channel; but it did not have the right to leave its engine partly in Lee street, in the condition in which this engine was left, knowing that it was liable to produce unusual noises and frighten animals being driven over said street. See authorities above cited.

3. It is contended that the proof shows that the cause of action was barred by the statute of limitations of two years,

and for this reason the court erred in refusing to instruct a verdict for the defendant. The accident occurred on the 20th day of October, 1897, and the original petition was filed September 19, 1898. The first amended original petition was filed October 10, 1899. In this pleading the appellant and the St. Louis & Southwestern Railway Company of Texas were made defendants. It was alleged that on said date (meaning the 20th day of October, 1897) the engine belonging to, used and operated by, said defendants, or by one of them, was, through the carelessness and negligence of defendants, or their servants, agents, or employees, left standing on the railroad tracks used and operated by said defendants, or one of them, over and across Lee street, in the city of Greenville,—said street being a much-traveled thoroughfare, over which a great number of people passed daily; that said engine, being used and operated by the servants of defendants, was by them carelessly and negligently left standing partly in and across said street, etc. A trial on that pleading resulted in a verdict and judgment in favor of plaintiff against both defendants. An appeal was taken, and this court reversed the judgment on the ground that there was no evidence connecting the St. Louis & Southwestern Railway Company with the transaction. Upon the return of the mandate from this court the appellant amended, and omitted the St. Louis & Southwestern Railway Company as a defendant. In other respects the allegations are substantially the same. We are of opinion that appellee's second amended petition did not set up a new cause of action. Had a recovery been had upon appellee's first amended original petition, it would have been a bar to a recovery under his second amended petition. The same evidence would support both appeals, the measure of damages is the same, and the allegations in each are subject to the same defenses. *Phoenix Lumber Co. v. Houston Water Co.* (Tex. Sup.) 61 S. W. 707. We conclude that the evidence does not show that the cause of action was barred by the statute of limitations.

There are other assignments of error in which complaint is made of the charge of the court and the verdict of the jury. We have carefully considered these assignments, and are of the opinion that no reversible error is shown in any of them.

We conclude that the judgment of the trial court should be affirmed. Affirmed.

YAZOO & M. V. R. CO. v. EAKIN.

(*Supreme Court of Mississippi, Feb. 24, 1902.*)

[31 So. Rep. 414.]

Frightening Horses—Stop, Look and Listen—Driving under Bridge Undergoing Repairs.*

While plaintiff was driving along a narrow road, with deep ditches

*See generally, preceding case, and foot-note.

Yazoo & M. V. R. Co. v. Eakin

on its sides, which passed under a railroad trestle, her horse was frightened by a pile driver being used to make necessary repairs to the trestle, and she was injured. She drove within 30 yards of the trestle, without stopping, looking, or listening, when an engine moved on the trestle and operated its pile driver: *held*, that she was guilty of contributory negligence.

Instructions.

Plaintiff, without stopping, looking, or listening, drove along a narrow road, with deep ditches on its sides, to within 30 yards of a railroad trestle, where a pile driver was in operation, making repairs, when her horse took fright, and she was injured. She testified that she called on the operatives to stop, and they laughed at her. Her testimony was contradicted in every material part of her case: *held*, that a charge that, if plaintiff's own negligence contributed to her injury, she could not recover, unless the disaster occurred because the defendant's employees "knowingly or intentionally" did something or refrained from some duty in the premises, should have been given without the interpolation of the words "or negligently."

Appeal from circuit court, Franklin county; Jeff Truly, Judge.

Action by Louisa Eakin against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

On March 23, 1900, plaintiff, in a buggy with her mother, was going to the town of Fayette along a public road. Inside the town limits the Yazoo & Mississippi Valley Railroad crosses this road over a high trestle. On March 23, 1900, a bridge gang in charge of a foreman was engaged in repairing this trestle, and plaintiff's horse became frightened at the pile driver that was being operated by defendant's said bridge gang, ran away, and threw her out of the buggy; and for injuries alleged to have been thus sustained she brought this suit. She recovered a judgment in the lower court for \$2,000. Defendant's motion for a new trial was overruled, and it appeals. The opinion contains a further statement of the facts.

Mayes & Harris and L. Brame, for appellant.

H. Cassidy, Jr., and J. McC. Martin, for appellee.

CALHOON, J. Going into the town of Fayette, the highway road of travel passes under a railroad trestle. The posts which sustain this trestle were becoming decayed, and needed replacement, and so the railroad company had an engine and pile driver and appliances to replace them. The necessity of this for the purposes of commerce and passenger transport is quite apparent. It is also apparent, on reason and authority, that, in the prosecution of this work of public necessity, the company, through its employees, is held by law to ordinary care, and no more, to prevent frightening the draft animals of highway travel; and this care, and no more, is required of travelers guiding such draft animals. The utmost that ought to be or which can be lawfully required is to suspend the operation of such ponderous machinery, where it is

possible to do so at the moment, where the fright of a draft animal is observed by the operatives. They may well assume, as the law assumes, that travelers in approaching such a trestle will use reasonable precautions to prevent disaster from the fright of their animals. Where their road goes over a railway or under its trestle, they should exercise ordinary prudence to ascertain whether trains are moving. This is a requirement for safety at all times on approaching crossings, and especially so where sight or hearing is obstructed. A failure in this is contributory negligence, and forfeits the right to recover, even though there was negligence in the railroad company in not sounding an alarm. This failure characterized the action of defendant, even according to her own statement. She was driving a horse whose actions corroborated testimony adduced to the effect that it was unsafe. She did not stop or look or listen. She says she drove to within 30 yards of the trestle, when an engine suddenly moved on the trestle and instantly commenced the operation of its pile driver, hammering on the piles (ordinarily impossible, by the way), and that the hammering frightened the horse. This drive by her was on a narrow road, with deep ditches on its sides. A clearer case of contributory negligence could not be presented. Under this state of facts, and the principles of law hereinbefore stated being too well settled in this state to admit of discussion, the plaintiff, of course, had no case, unless she could show reckless, willful, or malicious conduct on the part of defendant; and without such showing, no doubt, the court would not have permitted the verdict to stand. So she undertook to make this showing by evidence (sharply controverted, and by disinterested witnesses) that when the pile driver was put at work her horse exhibited alarm, and she called to the operatives to stop, and they did not, but simply laughed at her. In this condition of the case, after both sides rested, the defendant took the position (and a proper position) that if plaintiff's "own negligence or want of reasonable care contributed directly to her injury, if she was injured," she could not recover, unless it was shown that the disaster occurred because the company's employees "knowingly or intentionally" did something or refrained from some duty in the premises. This principle was invoked in the fifth charge asked by defendant,—refused as asked, but given with the interpolation of the words "or negligently." The objection and exception to this modification must be sustained, because it closed the door to the defense based on plaintiff's contributory negligence, even though the jury might believe there was no knowledge of her danger in the operatives, and no intentional neglect of duty on their part. In effect, it barred the defendant from all benefit of the doctrine of contributory negligence in any state of the evidence. We cannot concur with counsel in thinking that this error is cured by other instructions.

In this connection it should be said that plaintiff is seriously

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contradicted in every material part of her case by witnesses. She is contradicted as to distances, as to whether she was in fact hurt at all, as to her condition before and after the accident, and as to whether it was not caused by the breaking of a rein, and as to her movements immediately after her buggy was upset. All this emphasizes the importance of particularity in instructions to give each side the benefit of its own theory upon the testimony.

Reversed and remanded.

LAKE SHORE & M. S. RY. CO. v. BUTTS.

(*Appellate Court of Indiana, Division No. 1, Jan. 30, 1902.*)

[62 N. E. Rep. 647.]

Frightening Team—Usual and Necessary Noises.*

Where plaintiff drove an apparently gentle unfrightened team upon a railroad crossing in full view of the crew of a train standing some 40 feet distant, and such team was frightened by the noise incident to starting the train in the usual way, the servants of the railway were not negligent.

Negligence—Pleading.

In an action for personal injuries an allegation that the acts complained of were negligently done will not render the complaint invulnerable to demurrer, where it appears from the specific facts stated that the acts charged were lawful and proper.

Appeal from circuit court, Whitley county; Joseph W. Adair, Judge.

Action by John Butts against the Lake Shore & Michigan Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Bell & Doughman, for appellant.

R. P. Barr and E. K. Strong, for appellee.

ROBINSON, P. J. Action by appellee for personal injuries at a street crossing. Appellant's road, having at the place in question four tracks, runs east and west, crossing at grade a principal street in the city of Kendallville. Appellee approached the crossing with a team and load of hay, and appellant's flagman at the crossing signaled for him to cross. There was at the time standing near the crossing a locomotive engine attached to a train of freight cars. The locomotive was not emitting any steam or making any noise. There was nothing to obstruct the view of appellee by appellant's servants in charge of the engine. Appellee, believing it was safe to cross the tracks, and believing that the engine would remain as it was and would not move until he would have ample time

*See *Coleman v. Wrightsville & T. R. Co.* (Ga.), 23 Am. & Eng. R. Cas., N. S., 863; *Atchison, etc., R. Co. v. Morrow* (Kan.), 5 Am. & Eng. R. Cas., N. S., 262, and extensive note, 283 et seq.; 8 Am. & Eng. Enc. Law (2d Ed.) 421 et seq.; 5 Rap. & Mack's Dig. 1032 et seq.

to proceed over the tracks to a reasonable and safe distance, drove upon the tracks and crossing. "That the defendant's agents and servants in charge of said engine and cars, and said watchman at said crossing, well knew that when steam was turned from the boiler of the locomotive engines attached to a train of cars on defendant's railroad, that the escaping steam caused thereby would make a loud and hissing noise, and the moving of the engines and the starting of the train of cars attached thereto would make a loud and rattling noise, which noises and sounds were liable to and would frighten and scare horses that might be near by, and render them unmanageable and cause them to run away. That while plaintiff was so slowly and carefully driving said horses as aforesaid, and in plain view of the persons, servants, and agents of the defendant in charge of said engine and cars, and within the distance of forty feet of the said engine, and while plaintiff was in plain view, the defendant's agents and servants in charge and control of said engine and cars, without any notice or warning to plaintiff, negligently and carelessly turned the steam from the boilers on said engines, and started said locomotive engine and train of cars attached thereto, and that they caused a great and hissing noise by the escaping steam from said locomotive engines, and a loud and rattling noise by the starting and moving of said engines and cars, then and there and thereby, without any fault or negligence of plaintiff, frightened plaintiff's said horses so that they became and were unmanageable and ran away," throwing plaintiff to the ground and injuring him. "That when defendant's agents and servants negligently and carelessly turned the steam on said engines, and started and moved said engines and cars thereto attached, they, said agents and servants, well knew, or could have known by looking, at plaintiff's whereabouts on said crossing and close proximity to said engine and cars, with his said team and wagon as aforesaid, and that the same would likely frighten said horses."

The first question presented is the sufficiency of the complaint. The engine was standing near the crossing. Although it is charged that it had been standing there an unnecessarily long time, that act was not negligence, and does not in any way aid the other averments as to negligence. The act of stopping an engine near to a crossing is not of itself a negligent act. Besides, the only attempted charge of negligence was in reference to starting the engine and moving the train. The complaint charges that appellant's servants knew that when steam was turned from the boilers "to the engines" attached to a train of cars the escaping steam caused thereby would make a loud and hissing noise, and the moving of the engines and the starting of the train would make a loud and rattling noise, which noises and sounds would frighten horses; that is, when steam was applied in the ordinary way, necessary to start a train in the ordinary manner, these loud and

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hissing and rattling noises were produced. The only attempted charge of negligence is that the servants negligently and carelessly turned on the steam and started the train,—whether away from or toward the crossing is not shown. But the effect of these acts is averred to be the same as that produced in turning on such steam in the ordinary way, and such as was necessary to start the train in the ordinary manner. That is to say, the pleading does not show that any unnecessary, unusual, or extraordinary noises were produced because of any negligence of appellant's servants in applying the steam; but it does show that the same effects were produced from acts averred to have been negligently done as would have been produced from the same acts had they been properly done. So that if the complaint charges appellant with any actionable negligence it must be, not because appellant's servants turned on the steam in a careless and negligent manner, but because the proper starting of the engine and train was at a time and under such circumstances as would make that act a negligent one. Were appellant's servants guilty of any unlawful conduct while exercising a lawful right? Did they do any heedless or unnecessary act which was likely to and did produce the fright of the team? The starting of the locomotive and train in a way that produced such noises only as are necessarily produced in properly starting them, even though at a place of danger, and where horses are likely to be frightened, is not negligence per se. It must also be shown that it was at a time and under such circumstances as made it negligence. *Railroad Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; *Billman v. Railroad Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Railway Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026. It is true it is sufficient, as against a demurrer, for the complaint to charge that the act resulting in injury was negligently or carelessly done. This has been held many times. But this rule has no application if other averments show that the acts charged were lawful and proper. The injury here in question resulted from loud and hissing and rattling noises, which the complaint shows will result from a proper use of steam in starting and moving an engine and train. The act of the flagman in signaling appellee to cross goes properly to the question of appellee's contributory negligence. *Pierce v. Jones*, 22 Ind. App. 163, 53 N. E. 431. Upon the question of appellee's freedom from fault the complaint is not open to objection. The direction of the flagman was an assurance of safety upon which appellee had a right to rely (*Railroad Co. v. Schmidt*, 147 Ind. 648, 46 N. E. 344), but it is not averred that the flagman was negligent in directing appellee to cross the track under the circumstances claimed to have existed. The liability of appellant is not claimed because of any negligent act or conduct of appellant's flagman. The engine and train were rightfully upon appellant's track. Appellee was rightfully upon

the highway, and in driving his team across the track was guilty of no negligence. Both parties were where they had the right to be, and each had the right to carry on the particular business engaged in at the time and place in such manner as was reasonable and necessary to the use and enjoyment of their property. Appellant had the legal right to operate its road and move its trains with engines propelled by steam. In so doing certain noises are necessarily made. The single fact that a team took fright at these usual and necessary noises cannot make the company liable. If these usual and necessary noises were produced in the exercise of a lawful right, and the employees, through whose acts the noises were produced, were not guilty of any wrongful conduct, there can be no liability. If, then, the complaint is sufficient, it must be because the starting and moving of the engine and train, and the producing of these usual and necessary noises, were at a time and under such circumstances as made an otherwise lawful act unlawful. It is averred that the team was gentle, and was driven slowly. Conceding that the employees in charge of the engine saw the team all the time it was passing over the crossing, there is nothing to show that it was in any way frightened as it passed the engine, or that appellee was having any trouble controlling it, or that he was in any peril, or in any apparent danger. The team had passed upon the tracks and crossing, and was about 40 feet away from the engine. The complaint discloses no facts or circumstances existing at the time from which it could be said that those in charge of the engine could reasonably be expected to anticipate that the usual noises produced in starting an engine and train would frighten the team. In the case at bar it is not claimed that there was any willful or reckless conduct on the part of those in charge of the engine, or that any unusual or unnecessary noises were produced. In *Rodgers v. Railway Co.*, 150 Ind. 397, 49 N. E. 453, the complaint charged the blowing of the whistle "carelessly, negligently, recklessly, and without any necessity whatever." In *Railway Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774. *Id.*, 147 Ind. 638, 46 N. E. 344, appellee was directed by the flagman to cross, and when on the crossing opposite and near to the engine, appellant, "without warning and without notice, suddenly and in a very loud, violent, explosive, and negligent manner, blew off the steam from the boiler of said engine, and carelessly, negligently, and wrongfully suffered the steam to blow off and escape from the boiler of said engine in a sudden, loud and violent manner, thereby making a very loud, hissing, whistling, screeching, and blowing noise." In *Railway Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551, the charge was the engine was carelessly and negligently operated so as to make loud and unusual noises. "What appellee complains of," said the court, "is the negligent and careless use of the engine, in disregard of the duty, in sounding its whistle and blowing off its steam in such a way

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as to cause it to make not the usual noise, but an unusual noise. The ordinary sounding of the whistle and allowing steam to escape is not negligence, and such use of the engine is not complained of, but the negligent use of the engine." In *Railway Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026, the liability was based upon the careless, negligent and unnecessary sounding of the whistle. In *Railroad Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, the complaint was sustained upon the doctrine, applicable to the facts averred, that, where one person sees another in peril, it is the duty of such person to so act as not to increase the peril, and if, with knowledge of the facts, he does act so as to increase the peril, it is negligence. Giving the complaint a construction as favorable to appellee as the law permits, we think it fails to show that appellant was negligent. *Culp v. Railroad Co.*, 17 Kan. 475; *Favor v. Railroad Corp.*, 114 Mass. 350, 19 Am. Rep. 364; *Duvall v. Railroad Co.*, 73 Md. 516, 21 Atl. 496; *Railroad Co. v. Stinger*, 78 Pa. 219; *Cahoon v. Railway Co.*, 85 Wis. 570, 55 N. W. 900; *Abbott v. Kalbus*, 74 Wis. 504, 43 N. W. 367; *Whitney v. Railroad Co.*, 69 Me. 208; *Norton v. Railroad Co.*, 113 Mass. 366; *Campbell v. Railroad Co. (Sup.)* 4 N. Y. Supp. 265; *Id.*, 130 N. Y. 631, 29 N. E. 150.

Judgment reversed.

PHILLIPS v. ST. CHARLES ST. R. CO.

(*Supreme Court of Louisiana, Dec. 16, 1901.*)

[31 So. Rep. 135.]

Street Railroads—Injury to Passenger.*

Where the motoneer of a street car, in answer to a signal, is slowing down his car in order to stop it with the rear platform over the proper crossing, and a passenger has taken his position on the lower step of the platform, preparatory to getting off, the fact that the passenger loses his balance, and falls to the ground, it being claimed that such fall resulted from the sudden jerking of the car and from the passenger catching his shoe in a defective step, will not justify the conclusion that such fall should be attributed to the negligence of the carrier, when it appears that the irregularity of motion complained of was not greater than is usual in the stopping of street cars, and that the step was of an approved pattern, and without discoverable defects.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by A. B. Phillips against the St. Charles Street Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles Louque, Albert Voorhies, Lloyd Posey, and Boatner, Dodds & Boatner, for appellant.

Harry H. Hall, for appellee.

MONROE, J. This is an action in damages for personal injuries, said to have been sustained by plaintiff in getting off

*See notes at end of case.

one of the defendant's cars. The defense is a general denial. The plaintiff alleges that when the car upon which he had taken passage reached the corner of Orleans street it "slowed up and stopped to allow" him to get off, and that whilst he was stepping off the car jerked in starting again, and the heel and sole of his shoe were caught in the piece of metal covering the edge of the step, with the result that he was thrown to the stone pavement, and badly injured. In giving his testimony he says: "I had given the warning to the conductor to stop the car. When the car was about to stop, I put my foot on the step, and the car gave a sudden jerk, and flung me off." And at another place: "It was just about to stop as I put my foot on the step. * * * The car gave a sudden jerk, and my heel caught in that piece of iron, and I was thrown off by the sudden jerking of the car." Before bringing suit the plaintiff's attorney addressed a communication to defendant, in which the accident was attributed to "a defect in the step of the car," nothing being said about "a sudden jerk"; and the only witness examined for plaintiff who was present at the time testifies that, "whilst he was immediately behind the plaintiff on the platform, prepared also to alight, he would probably not have recognized or remembered the 'jerk' or 'increased momentum' spoken of if the plaintiff had not fallen, because that is a common thing on cars." As to the alleged defect in the step, the plaintiff seems to have been under the impression that there was a sheet or piece of iron, zinc, or other metal on the step, in which he caught the heel or sole of his shoe; but his testimony is by no means definite, and the single witness above mentioned states that his conclusion that the plaintiff had caught his foot was largely a matter of inference "from the method of his fall, and from his (the witness') recognition of the fact that something had caught the plaintiff's foot." In other words, he does not undertake to say that he actually saw anything more than the step itself. Upon the other hand, the step, having been taken from the car, was brought into court as an exhibit, identified, and shown to be of an approved pattern, largely used throughout the country, and apparently safe. From the whole case, as presented, we conclude that the plaintiff left his seat whilst the car was in motion, and took a position upon the lower step of the platform, preparatory to alighting when the car should reach the crossing. It may be that the motoneer had slightly miscalculated, and that it became necessary just then to accelerate the motion of the car in order that the rear platform might be exactly over the crossing when the car should stop, and that the plaintiff, resting, possibly, on one foot, was taken by surprise by the forward movement, and lost his balance. But slight irregularities of movement are common incidents in the starting and stopping of street cars, and those who prepare to alight and who do alight whilst the cars are in motion assume the risks resulting from such irregularities.

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We are of opinion that the defendant did all that was required of it to deliver its passenger safely, and that the plaintiff is not entitled to recover.

Judgment affirmed.

NOTES.

CARRIERS OF PASSENGERS—DUTIES IN TAKING ON AND LETTING OFF PASSENGERS.

BY THEODOR MEGAARDEN.

- I. Scope of Note.
- II. General Rule.
- III. Duty to Receive and Discharge Passengers at Usual Place.
 - A. General Rule.
 - B. Failure to Stop Train at Station.
 - C. Failure to Stop Train Alongside Station Platform.
 - D. When Passengers Are Carried on Freight Trains.
 - E. Street Railways.
 - F. Waiver by Passenger of Right to Be Set Down at Usual Place.
- IV. Duties When Passengers Are Received at Other Than Usual Places.
- V. Management of Train in Drawing Up to Platform or Stopping Place.
- VI. Duty to Stop Train or Street Car.
- VII. Allowing a Reasonable Time to Get On or Off.
 - A. General Rule.
 - B. When the Train or Street Car Is Merely Slowed Up.
 - C. When the Train or Street Car Is Stopped.
 1. General Rule.
 2. Allowing Time to Board Railroad Train.
 3. Allowing Time to Alight from Railroad Train.
 4. Allowing Time to Board Street Car.
 5. Allowing Time to Alight from Street Car.
 6. Allowing Time to Reach Place of Safety.
 - a. In General.
 - b. Time to Secure Seat.
 - D. What Constitutes a Reasonable Time.
 - E. Starting of Vehicle at Signal of Unauthorized Person.
- VIII. Duty to See Whether Passengers Have Gotten On or Off.
 - A. Difference between Obligation of Railroad and Street Railway Companies.
 - B. Duty of Railroad Companies.
 - C. Duty of Street Railway Companies.
- IX. Announcement of Stations or Stopping Places.
- X. Awaking Sleeping Passengers.
- XI. Assisting Passengers to Board or Alight.
- XII. Notifying Passengers of Starting of Train.
- XIII. Directions as to Boarding Trains.
- XIV. Liability for Act of Fellow Passenger.
- XV. Misleading Invitations to Alight.
 - A. In General.
 - B. Announcing Name of Station.
 - C. Stopping Train.
 - D. Announcing Station and Stopping Train.
 1. General Rule.
 2. Injury to Passenger in Consequence of Dangerous Character of Stopping Place.
 3. Injury to Passenger by Movement of Train.
 - E. Announcing Station and Stopping Train, as Required by Law, at Crossing.

I. SCOPE OF NOTE.

A discussion of the duties of passenger carriers in taking up and setting down passengers might very properly embrace a consideration

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of the duties of carriers in providing facilities for getting on and off the vehicles, including their duties with respect to providing suitable entrances and exits to and from the vehicles, and in providing suitable stopping places and stations. In this note, however, the means of getting on and off the vehicles, will be considered only as they are connected with management of the means of conveyance, and the supervision of the entrance and exit of passengers by the servants of the carriers, which are the matters which it will be the object of this note to discuss.

II. GENERAL RULE.

It may be affirmed as a general rule that the implied duties of passenger carriers to exercise care to carry their passengers safely includes the duty to afford them a reasonable opportunity to get on or off the means of transportation in safety, and, if the carriers violate this part of their duty, they are guilty of negligence. *Fairmount, etc., R. Co. v. Stutler*, 54 Pa. St. 375, 93 Am. Dec. 714; *Appleby v. South Carolina, etc., R. Co.*, 60 S. Car. 48, 38 S. E. 237, 20 Am. & Eng. R. Cas., N. S., 581; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *Norfolk, etc., R. Co. v. Prinnell*, 1 Va. Dec. 626, 3 S. E. 95, 30 Am. & Eng. R. Cas. 574.

III. DUTY TO RECEIVE AND DISCHARGE PASSENGERS AT USUAL PLACE.

A. GENERAL RULE.

This right of passengers to have a reasonable opportunity to get on or off the means of conveyance, entitles them, generally speaking, to be taken up and set down at the usual stopping places. *Madden v. Port Royal, etc., R. Co.*, 41 S. Car. 440, 19 S. E. 951, 20 S. E. 65, 2 Am. & Eng. R. Cas., N. S., 384; *Madden v. Port Royal, etc., R. Co.*, 35 S. Car. 381, 14 S. E. 713, 52 Am. & Eng. R. Cas. 286. However, it is not meant by this that the mere stopping at another than the usual place in receiving or discharging passengers is itself negligence which will alone give a passenger a cause of action against the carrier, but only that it is one of the facts to be considered in determining the question of the carrier's negligence in taking up or setting down passengers.

B. FAILURE TO STOP TRAIN AT STATION.

The application of the above-stated rule may be first illustrated by cases in which it appeared that the trains were stopped at such a distance from the station, and under such circumstances, as not to mislead the passengers as to their true positions. In cases which may, for the sake of convenience, be thus classified, it has been held that if a train runs past, and is stopped at a distance from, the station, it is the conductor's duty to cause it to be returned in order that a passenger may alight at the station, and if that duty is not waived by the passenger and is not performed, the passenger has a cause of action against the carrier (*Louisville, etc., R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796; *Alabama, etc., R. Co. v. Sellers*, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17), especially if the passenger is ordered, or otherwise compelled, to leave the train. *Louisville, etc., R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796; *Evansville, etc., R. Co. v. Kyte*, 6 Ind. App. 52, 32 N. E. 1134; *Texas, etc., R. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *Dave v. Morgan's Louisiana, etc., R. & S. S. Co.*, 47 La. Ann. 576, 17 So. 128, 2 Am. & Eng. R. Cas., N. S., 127; *Foss v. Boston, etc., R. Co.*, 66 N. H. 256, 21 Atl. 222, 47 Am. & Eng. R. Cas. 566, 49 Am. St. Rep. 607, 11 L. R. A. 367; *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493, 14 S. E. 943, 28 Am. St. Rep. 883; *International, etc., R. Co. v. Sampson* (Tex. Civ. App. 1901), 64 S. W. 692. Plaintiff was carried four hundred yards by his station, where his trunk was put off uninjured. He requested the conductor to back up his train to the station platform, which he refused, and threatened to carry the plaintiff to the next station if he

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did not alight. Plaintiff alighted in the mud and a slight rain and walked back to the station. A verdict for plaintiff was sustained. *N. O., J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785. Where a train was not stopped long enough to enable plaintiff, a woman with four children, all under the age of six years, in her charge, to get off, and she was compelled to alight, about five o'clock on a cold winter morning, at a place where the ground was wet about six hundred yards from the station, and to walk back with the children, carrying one of them in her arms, it was held that the train should have been backed to the station and that the company was chargeable with negligence. *Fordyce v. Dillingham* (Tex. Civ. App. 1893), 23 S. W. 550. Where a train was not stopped at, but some distance from, the station, and the conductor directed the passengers to get off, a passenger who, while in the exercise of due care, was injured in alighting in consequence of the place where the passengers were required to alight being dangerous and unsuitable for the purpose, was held to have a cause of action against the carrier. *Hinshaw v. Raleigh, etc., R. Co.*, 118 N. Car. 1047, 24 S. E. 426, 3 Am. & Eng. R. Cas., N. S., 558. And a railroad company has been held liable to a passenger who was carried by a point where a road crossed the track, and where it was customary to put off passengers, and who was put off, in the nighttime, at a place which, under the circumstances, was more dangerous than the crossing. *Houston, etc., R. Co. v. Smith* (Tex. Civ. App. 1895), 32 S. W. 710, 2 Am. & Eng. R. Cas., N. S., 177, motion for rehearing overruled in 33 S. W. 896. Plaintiff was negligently and wrongfully carried beyond and away from the usual stopping place, where it was customary to receive and discharge passengers, into the switching yard, where there were no accommodations for passengers in getting on or off the cars, and where there were special risk and hazards. The carrier, it was held, was, under the circumstances, bound to use every precaution for plaintiff's protection, the question as to whether it did or did not do so being for the jury, and a verdict for plaintiff, who, just after alighting, and while crossing an adjoining track, had been run into by an engine and injured, was sustained. *Franklin v. Southern California, etc., R. Co.*, 85 Cal. 63, 24 Pac. 723. An action was brought by a husband against a railroad company for damages which his wife had sustained by reason of the negligence of the conductor of the train upon which she had taken passage from Meridian to Newton, in not stopping the train at that station, to which she had a ticket as a passenger, and in failing to give her notice when the train reached there, in consequence of which she was carried about two miles past that place, and the conductor, refusing to take the train back to the station, put her off at the place where the train had stopped, late at night, and, she being without a protector, placed her under the charge of two strange negro men, in whose company she was compelled to walk back late at night, over strange roads and dangerous bridges, in great bodily exposure and terror of mind. It was held that the action was maintainable. *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332. In order to charge the carrier with liability in these cases it is not necessary that force shall have been used to compel the passenger to alight. *Alabama, etc., R. Co. v. Sellers*, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17. A passenger may even be justified in alighting from the train after the conductor has had a reasonable opportunity to make known his intention of returning, but does not offer to return, or manifest any intention of so doing. *Louisville, etc., R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796; *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439. See *Case v. Delaware, etc., R. Co.*, 191 Pa. St. 450, 43 Atl. 319. But if the conductor offers, or manifests a purpose, to return, and the passenger will not wait the necessary time, or otherwise waives the right to be returned, and voluntarily leaves the train, no action will lie against the carrier. *Louisville, etc., R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796. And if a passenger is given a proper opportunity to alight at the station but

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neglects to do so, and is carried a short distance beyond the station, the train need not be returned and the passenger may, in the absence of a statutory inhibition, be put off at a proper place and in a proper manner. *St. Louis, etc., R. Co. v. Lewis* (Ark. 1901), 61 S. W. 163.

C. FAILURE TO STOP ALONGSIDE STATION PLATFORM.

A railroad train should be stopped alongside the station platform to enable passengers to get on or off with safety (*Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Baltimore, etc., R. Co. v. Leapley*, 65 Md. 571, 4 Atl. 891, 27 Am. & Eng. R. Cas. 167; *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152), or if that is not done, the carrier should exercise care that the place selected is safe, or that the passengers are afforded necessary assistance in getting on and off the cars. *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152; *International, etc., R. Co. v. Smith* (Tex. 1890), 14 S. W. 642, 44 Am. & Eng. R. Cas. 324.

The cases are numerous in which railroad companies have been held liable for injuries sustained by passengers in consequence of trains not being stopped alongside station platforms so that the passengers could step directly from the trains to the platforms, or vice versa. In a case in which it appeared that neither end of the car in which plaintiff was riding was opposite the platform when the train stopped, and the only way in which plaintiff, a woman, could step from the train to the platform was to pass through the smoker, a judgment for plaintiff, who was injured in getting off, in the dark, at the rear end of the car where there was a depression in the ground which caused her, in stepping down, to break her hold on the hand rod and fall, was sustained. *Cartwright v. Chicago, etc., R. Co.*, 52 Mich. 606, 18 N. W. 380, 16 Am. & Eng. R. Cas. 321, 50 Am. Rep. 274. Plaintiff, a female, was a passenger; on the arrival of the train at her station the engine and part of the carriage in which she was riding were driven past the end of the platform and came to a standstill, the door of her compartment being beyond the end of the platform. Upon the train stopping she arose and opened the door, and stepped on the iron step; she looked out and saw the station master, who was the only attendant at the station, putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for some one to help her until she became afraid of the train moving away; and no one then coming she tried to alight by getting onto the footboard; she had her back to the carriage, and she had hold of the door with her right hand, while her left held several small bundles, and got one foot onto the footboard, and whilst endeavoring to get the other foot onto the board, she lost her hold of the door, and slipped and fell, and was injured. It was held that the jury could find that the expectation of being carried beyond her station was reasonably entertained by her, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting, and that the defendants were therefore liable for the injury which had been caused by their neglect of duty. *Robson v. North Eastern Ry. Co.*, L. R. 10 Q. B. 271. Where a train stopped so that the rear car, in which plaintiff was riding, was not opposite the platform, and plaintiff was injured, although it was in the daytime, while stepping from the bottom step of the car to the ground, a distance of about three feet, and plaintiff testified that it was defendant's custom not to allow passengers to go forward from one car to another in getting out at stations, and there was evidence that other passengers had previously been injured while getting out at the same place, the question of defendant's liability was left to the jury. *Bullard v. Boston, etc., R. Co.*, 64 N. H. 27, 5 Atl. 838, 27 Am. & Eng. R. Cas. 117, 10 Am. St. Rep. 367. Plaintiff, a woman passenger, was injured by stepping off the platform, while attempting to board the car for women, which had been stopped so that the front end of the car, which was the end nearest the platform, was about two feet away from the end of the

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platform. It was in the nighttime, and no stationary lights were provided for lighting the platform. A judgment for plaintiff was sustained. *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821. Where a declaration alleged, in effect, that a train upon which plaintiff was a passenger was negligently stopped at a place where defendant was accustomed to take on and let off passengers so that the last two cars, in one of which plaintiff was a passenger, stood on a trestle quite a distance from the ground; that it was night and dark and no lights were provided; that no warning was given the passengers of the position of the cars and no assistance offered them to avoid the dangers of alighting; that plaintiff unaware of the danger of alighting, in doing so, fell and was injured; it was held that the declaration stated a cause of action. *Falk v. New York, etc., R. Co.*, 56 N. J. L. 380, 29 Atl. 157, 58 Am. & Eng. R. Cas. 191. Where the car, in which plaintiff was riding, was stopped so that the front end was opposite the platform but the rear end was not, and the passengers were not warned of that fact or directed to leave by the front door, a judgment for plaintiff, who was injured while alighting, in the dark, at the rear end of the car, was sustained. *McDonald v. Illinois, etc., R. Co.*, 88 Iowa 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263. But in a very similar case, in which it appeared that the accident occurred in the daytime, it was held that a passenger who elected to alight at the end of the car which was not opposite the platform had no action against the company. *Eckerd v. Chicago, etc., R. Co.*, 70 Iowa 353, 30 N. W. 615, 27 Am. & Eng. R. Cas. 114.

D. WHEN PASSENGERS ARE CARRIED ON FREIGHT TRAINS.

In particular cases, a railroad company may be chargeable with negligence in stopping a freight train for the purpose of taking on or letting off passengers at a place other than the station platform or regular place for receiving and discharging passengers. *Alabama, etc., R. Co. v. Sellers*, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17; *White Water, etc., R. Co. v. Butler*, 112 Ind. 598, 14 N. E. 599, 34 Am. & Eng. R. Cas. 467; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699. See *Adams v. Missouri, etc., R. Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 41 Am. & Eng. R. Cas. 105. But there is no rule of law requiring railroad companies carrying passengers on a freight train to afford passengers an opportunity to get on or off at the station platform; the company fulfills all legal requirements when it affords the passengers a sufficient opportunity to board or leave the train at a reasonably safe and convenient place upon the station grounds, although not at the station house or platform (*Hemmingway v. Chicago, etc., R. Co.*, 67 Wis. 668, 31 N. W. 268, 28 Am. & Eng. R. Cas. 216), and it may require passengers to board or alight from the train at some appropriate and convenient place not connected with the platform. *Eddy v. Wallace*, 49 Fed. 801, 52 Am. & Eng. R. Cas. 265; *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31; *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157; *Browne v. Raleigh, etc., R. Co.*, 108 N. Car. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544. Passengers were permitted to ride on a freight train under special regulations, which were posted in its stations, to the effect that they could not require the passenger coach attached to the train to be pulled up alongside the platforms at the stations. Plaintiff's husband, who was with her and who purchased the tickets for the train, had notice of the regulations. In plaintiff's suit to recover damages for being left at the station because the train was not pulled up to the platform, it was held that the action would not lie. *Connell v. Mobile, etc., R. Co.* (Miss. 1890), 7 So. 344.

But the mere fact that passengers are carried on a freight train does not relieve the carrier of the duty to exercise care in affording them a safe and convenient place for getting on or off, and guarding them against the dangers incident to passing to and from the train. *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng.

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R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157; *Browne v. Raleigh*, etc., R. Co., 108 N. Car. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544. A freight train was stopped, about half past nine o'clock on a dark and stormy night, so that a cattle guard, which was partly uncovered, intervened between the station platform and the caboose, or passenger car. Plaintiff, who had been accustomed to taking the train with the caboose standing some distance from the platform but who had never taken it while the caboose was so far away as to be beyond the cattle guard, which he had never noticed and of which he had no knowledge, was injured in attempting to pass from the platform to the caboose by suddenly and unexpectedly walking and falling into the open cattle guard. It was held that the facts clearly warranted the jury in finding that defendant was guilty of negligence. *Hartwig v. Chicago*, etc., R. Co., 49 Wis. 358, 5 N. W. 865, 1 Am. & Eng. R. Cas. 65. Where plaintiff, a passenger upon a freight train in charge of stock, was obliged to return to a station which the train had passed and where the cars containing his cattle had been left by mistake and without his knowledge, and the conductor, in transferring him to a train which would take him back, instead of stopping the caboose in which plaintiff was riding at a regular station as he had promised, stopped it in close proximity to a place of danger, and directed him to get off, without notifying him that he was at a place other than the regular station, or warning him of, or affording him any means of discovering and avoiding, the dangers to which he would be exposed in going from the one train to the other, it was held that defendant was liable for the injuries received by plaintiff in making the transfer. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168, 11 S. W. 559. Where a freight train on which plaintiff was a passenger stopped a quarter of a mile short of the station, and he broke his leg in passing from the train to the station, in getting over a flat car which stood on a bridge which he had to cross, it was held that defendant's negligence was a question for the jury. *Adams v. Missouri*, etc., R. Co., 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 41 Am. & Eng. R. Cas. 105. It has been held that where a freight train was stopped at a dangerous, instead of the usual and safe, stopping place on a dark night, and the name of the station announced, the act of the conductor, in leaving the caboose with the light, by which the passenger could or might have seen the danger, made his failure to warn and inform passengers of the dangerous character of the surrounding premises gross negligence. *McGee v. Missouri*, etc., R. Co., 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706. In a somewhat similar case, plaintiff was a passenger on a freight train which arrived at the end of his journey between eleven and twelve o'clock on a dark night. The train did not stop at the platform of the station but at a place where, along the side of the track and some three or three and a half feet from it, there was a retaining wall. The height of the wall on the side next the track was from five to eight inches from the ground, but on the other side it was from fifteen to twenty feet from the ground. Plaintiff was told to leave the train, but no light was furnished him and no notice given him of the proximity of the wall. In following an employee connected with the train, who took his luggage and proposed to guide him to the station, he fell over the wall to the ground below and was severely injured. A verdict for plaintiff was sustained. *Smith v. Central R.*, etc., Co., 80 Ga. 526, 5 S. E. 772, 34 Am. & Eng. R. Cas. 456. A passenger on a freight train brought suit for damages alleging negligence on the part of the railroad company in directing her to leave the train at a place of danger. It appeared that the conductor, knowing the danger to which she would be exposed, directed her to leave the train in the nighttime at a place several hundred feet from the platform at her station; that she was thus compelled to walk along a side track, in which there was an open culvert, into which she fell and was injured; and that, while endeavoring to extricate herself, she was frightened by the approach of cars

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on the side track. A judgment for plaintiff was sustained. *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769, 37 Am. & Eng. R. Cas. 187.

E. STREET RAILWAYS.

A street railway company is under a duty to the public to stop at its regular crossings, on a seasonable signal, to receive those desiring to take passage. *Jackson Electric R., etc., Co. v. Lowry* (Miss. 1901), 30 So. 634, 23 Am. & Eng. R. Cas., N. S., 103. And it cannot avoid this duty by any practice or rules of its own. Plaintiff signaled an approaching street car, while he was standing at the crossing of two intersecting streets, which was a regular stopping place on defendant's line, and the signal was seen by the employees of defendant, but for some reason the car did not stop at the crossing, but ran on thirty or forty feet beyond. The conductor on the car beckoned to plaintiff to come ahead, which plaintiff at first undertook to do, but finding the ground wet and muddy, refused to go, and demanded that the car should be backed to the crossing. The conductor refused to do so on the ground that it was against the rules of the company to back cars, and, plaintiff still refusing to go through the mud to the car, the car moved on and left him standing at the crossing. Judgment for plaintiff was sustained, the court saying that the rule of the company, though it might be reasonable in some cases, was unreasonable when applied in the particular case, in which it appeared that the night was dark and rainy, the road muddy, the car standing thirty or forty feet beyond the crossing, and the passenger, as was known to the employees on the car, would have to walk seven squares unless he got passage. *Jackson Electric R., etc., Co. v. Lowry* (Miss. 1901), 30 So. 634, 23 Am. & Eng. R. Cas., N. S., 103.

F. WAIVER BY PASSENGER OF RIGHT TO BE SET DOWN AT USUAL PLACE.

A passenger who voluntarily alights from a train, knowing, or having reason to believe, that the train has not stopped at the place where it is customary to take on and left off passengers, may, in a proper case, be held to waive his right to be put off at the regular stopping place, and to assume the risks incident to getting off at the place where the train has stopped. *St. Louis, etc., R. Co. v. Lewis* (Ark. 1901), 61 S. W. 163, 20 Am. & Eng. R. Cas., N. S., 483; *Gulf, etc., R. Co. v. Jordan* (Tex. Civ. App. 1895), 33 S. W. 690; *Gulf, etc., R. Co. v. Head* (Tex. Civ. App. 1891), 15 S. W. 504. It has been said that if a train is stopped at a point other than the platform, and the passenger voluntarily elects to get off at that place, notwithstanding the offer of the conductor to bring the train alongside the platform, the original obligation of the carrier as to the place for setting down the passenger is changed to the extent of substituting a new place for its performance, and precludes a recovery for injuries received by the passenger in alighting, unless, indeed, the carrier is guilty of negligence in the discharge of the new obligation. *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96, 19 S. W. 1017. It has been held that a person who gets on a wrong train by mistake and, on the train being stopped for him a half or three-quarters of a mile out from the station, voluntarily alights to walk along the track to the proper train standing not far off, assumes the risks incident to doing so and cannot recover for injuries sustained in consequence of falling into a cattle guard. *Finnegan v. Chicago, etc., R. Co.*, 48 Minn. 378, 51 N. W. 122. Where a passenger who is carried by his station while asleep, is awakened after the train has gone about a mile and elects to get off there to walk back, and has a narrow escape from being run over by a freight train on a trestle, cannot recover damages for the fright sustained. *Wilson v. New Orleans, etc., R. Co.*, 68 Miss. 9, 8 So. 330. But the fact that a passenger, who was carried a distance beyond her station through the negligence of the carrier and was not fully informed of the difficulties in the way of returning, elected to get off

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and walk back rather than to be carried to the next station, she being incumbered with two children and being without money, did not, it has been held, debar her of a right to recover damages. *Galveston, etc., R. Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187.

IV. DUTIES WHEN PASSENGERS ARE RECEIVED AT OTHER THAN USUAL PLACES.

If a railroad company does not receive passengers at the platform or regular place provided for that purpose, but suffers or directs passengers to get on its cars at other places, it must exercise care to prevent accidents to the passengers while entering. *Allender v. Chicago, etc., R. Co.*, 43 Iowa 276. Although a street railway has provided regular stations, if its trains are stopped at other places, as where they are stopped in compliance with a statutory requirement at intersecting railways, and if the public is in the habit of entering or quitting the cars at such places, without objection from the company's servants, passengers entering the cars at such places are entitled to the protection of all the duties imposed upon the carrier in receiving and discharging passengers at its regular stations, except so far as it may be relieved therefrom by obvious risks, incident to the nature and condition of such place of customary use. *North Birmingham, etc., R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

V. MANAGEMENT OF TRAIN IN DRAWING UP TO PLATFORM OR STOPPING PLACE.

Railroad companies are bound to manage trains with care in drawing up to platforms or stopping places so as not to mislead passengers as to the proper time to get on or off. But since a train may sometimes come to a stop short of, or may overshoot, the exact point at which it should be stopped, on account of the condition of the track or other causes, without any negligence in providing proper brakes and other appliances or in the management of the train, the mere fact that a train, in approaching a station, is temporarily stopped at a point short of, or beyond, the proper place, before coming to a final stop for the purpose of taking on or letting off passengers, is not of itself negligence. *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489, affirming 4 Hun (N. Y.) 765. To amount to negligence the stop must be of such duration and be made under such circumstances as reasonably to constitute an invitation to passengers to board or alight, and the movement forward or backward must be made without warning, while passengers are getting on or off in response to the invitation. *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374, 46 N. W. 773, 44 Am. & Eng. R. Cas. 337.

If the temporary stop is of such duration, and is made after the name of the station has been announced and under such circumstances, as to indicate an invitation to passengers to get on or off, and no warning is given them that the stop is not final or other steps taken to prevent them from acting upon the apparent invitation, the carrier's negligence becomes a question for the jury, and the facts will justify a recovery by a passenger who is injured, while in the exercise of due care, by the sudden starting of the train while he is in the act of alighting. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631, reversing 31 Ill. App. 100; *Floytrup v. Boston, etc., R. Co.*, 163 Mass. 152, 39 N. E. 797, 2 Am. & Eng. R. Cas., N. S., 273; *Wood v. Lake Shore, etc., R. Co.*, 49 Mich. 370, 13 N. W. 779, 8 Am. & Eng. R. Cas. 478; *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374, 46 N. W. 773, 44 Am. & Eng. R. Cas. 337; *Leslie v. Wabash, etc., R. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489, affirming 4 Hun (N. Y.) 765. In a case in which it appeared that, after the name of the station had been announced, the train was stopped a little short of the platform and then started again for the purpose of draw-

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ing up alongside of the platform, and plaintiff, believing that the platform had been reached, and, it being so dark that he could not see that it had not been reached, got off at the first stop and was injured, the company was held liable. *Devine v. Chicago, etc., R. Co.* (Iowa, 1897), 69 N. W. 1042. Similar circumstances may justify a recovery even by a passenger upon a freight train, notwithstanding that it is not to be expected, considering that the great length and weight of freight trains and the appliances necessary to their operation render them less easy to control, that there will be the same particularity in drawing up to a station by a train of that character as by a train devoted exclusively to passenger service. A freight train, upon which plaintiff was a passenger, shortly after the name of the station had been called, came to a stop at the platform for a moment and then was jerked forward, coming to a stop farther on. Plaintiff, having heard the station announced in the usual manner and observing the train come to a standstill at the station platform, arose from her seat when the first stop was made, and was thrown to the floor of the car by the forward movement of the train, and seriously injured. A judgment for plaintiff was sustained. *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411. The train upon which plaintiff was a passenger was stopped near plaintiff's station and she was notified by those in charge of the train to alight. She went out upon the platform but found that it was impossible for her to alight at that place. She was then told by the servants of defendant to remain on the platform. While she was thus upon the platform, in the dark, with a child in her arms, the train was started with a violent jerk, which caused the door of the car to violently close upon and injure her fingers. A verdict of judgment for plaintiff was sustained. *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338. But where a train was first stopped so that the baggage car was a little short of the baggage on the platform, and, while plaintiff was standing on the platform of one of the cars supporting himself by resting his hand on the facing of the door, the train moved a little forward, gently, and without jerking, and stopped as it ordinarily stopped, without jerking, it was held, in an action by plaintiff to recover for injuries received in consequence of the door shutting on his hand when the second stop was made, that there was no negligence in the management of the train and that plaintiff could not recover. *Skinner v. Wilmington, etc., R. Co.* (N. Car. 1901), 39 S. E. 65, 22 Am. & Eng. R. Cas., N. S., 32. Even though the announcement of the station may have been made by some unauthorized person, it is a question for the jury whether the fact that such a call has been publicly made does not impose upon the carrier a duty to give counterwarning that passengers are not yet to leave the train, and whether it is negligence to fail to do so. *Floytrup v. Boston, etc., R. Co.*, 163 Mass. 152, 39 N. E. 797, 2 Am. & Eng. R. Cas., N. S., 273.

On the ground that there is no rule of law requiring a train to be stopped when it first reaches the station platform, it has been held that it is not negligence to run a train by the platform without stopping, in accordance with a regular custom of running the train a distance beyond the platform to allow another train, going in the opposite direction, to pass, and then backing the train to the platform for the purpose of setting down passengers and discharging baggage. *Hemmingway v. Chicago, etc., R. Co.*, 67 Wis. 668, 31 N. W. 268, 28 Am. & Eng. R. Cas. 216. But as to whether the conductor was negligent in failing to inform a boy ten years of age, who was a passenger on the train, that the train would be run by, and then returned to, the platform, to afford him an opportunity to alight, or taking other proper steps to prevent him from alighting when the train first passed the platform, was held to be a question for the jury. *Hemmingway v. Chicago, etc., R. Co.*, 72 Wis. 42, 37 N. W. 804, 33 Am. & Eng. R. Cas. 511, 7 Am. St. Rep. 823.

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VI. DUTY TO STOP TRAIN OR STREET CAR.

It is sometimes provided by statute that trains shall be brought to a standstill at stations for the purpose of receiving and discharging passengers. *South Carolina Gen. Stat.*, sec. 1486; *Thomas v. Charlotte, etc., R. Co.*, 38 S. Car. 485, 17 S. E. 226. And it has sometimes been declared in cases which were apparently governed solely by common-law principles, unaffected by statutory provisions, that a railroad company should not merely run a train by a station slowly, but should bring it to a standstill opposite the platform or place for receiving and discharging passengers. *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. Cas. 198, 40 Am. Rep. 105; *Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577; *Toledo, etc., R. Co. v. Wingate*, 43 Ind. 125, 37 N. E. 274, 42 N. E. 477, 58 Am. & Eng. R. Cas. 232; *Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919; *Price v. St. Louis, etc., R. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Bucher v. New York, etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Filer v. New York, etc., R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Galveston, etc., R. Co. v. Thornsberry* (Tex. 1891), 17 S. W. 521. But it probably was not meant, and it can scarcely be true, that this is an absolute duty, so that the mere failure to bring a train to a full stop to take on or let off passengers will, in every case, be alone sufficient to charge the railroad with negligence. While there may be a general duty to stop trains, and while a passenger may reasonably expect and have a right to demand that a train be stopped, the negligence of the railroad in failing to do so, must, in particular cases, be a question for the jury. Thus it has been held that the question of whether it was negligence on the part of a railroad company, under the circumstances of the case, to fail to bring its train to a stop at a flag station where a passenger was to be set down, should have been left to the decision of the jury. *Treat v. Boston, etc., R. Co.*, 131 Mass. 371, 3 Am. & Eng. R. Cas. 423. It certainly is not negligence as a matter of law for the driver of a street car merely to slacken the speed of the car to enable a passenger, who does not indicate any desire to have the car stopped, to get on. That the failure to stop a street car is not negligence per se "is clearly indicated by the daily custom of drivers upon street cars to merely slacken the speed of their cars in order to take on passengers, without any injury resulting." *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas., N. S., 293. See *Weber v. New Orleans, etc., R. Co.* (La. 1900), 28 So. 892. But a finding by the jury that it was negligence for the driver of a street car to stop the car at the place where a boy, ten years of age, intended to get off, has been sustained. *Brennan v. Fairhaven, etc., R. Co.*, 45 Conn. 285, 29 Am. Rep. 679.

VII. ALLOWING A REASONABLE TIME TO GET ON OR OFF.

A. GENERAL RULE.

Whether a train or street car is merely slowed up or it is brought to a standstill for the purpose of taking on and setting down passengers, passengers must be allowed a reasonable time to get on or off the train or car in safety.

B. WHERE THE TRAIN OR STREET CAR IS MERELY SLOWED UP.

Thus where a railroad train has been slowed up to allow passengers an opportunity to get on or off, the speed of the train must not be increased before a passenger has had a reasonable time to board, or alight from, the train. *Distler v. Long Island R. Co.*, 151 N. Y. 424, 45 N. E. 937, 6 Am. & Eng. R. Cas., N. S., 235, 35 L. R. A. 762; *Filer v. New York, etc., R. Co.*, 68 N. Y. 124; *Texas, etc., R. Co. v. Elliott* (Tex. Civ. App. 1901), 61 S. W. 726. See *Houston, etc., R. Co. v. Runnels*, 92 Tex. 305, 47 S. W. 971, 12 Am. & Eng. R. Cas., N. S., 800, reversing 46 S. W. 394. Where it is customary for trains merely to be slowed up at a station for

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which a passenger has a ticket, the passenger, who is, by the announcement of the station, called to the platform for the purpose of alighting, is entitled to damages received by falling from the steps of the car in consequence of the carrier's negligence in suddenly increasing the speed of the train, when it should have been slowed or stopped. *Brashear v. Houston Cent., etc., R. Co.*, 47 La. Ann. 735, 17 So. 260, 49 Am. St. Rep. 382. If, while a passenger is in the act of boarding a slowly moving train with the knowledge, and by the direction, of the conductor, the speed of the train is suddenly increased, and the passenger, who is in the exercise of due care, is thereby injured, the carrier is liable. *Missouri, etc., R. Co. v. Foreman* (Tex. Civ. App. 1898), 46 S. W. 834. According to plaintiff's testimony, plaintiff, after the name of his station had been twice called, went to the front door of the car to get off, and, the door being opened for him by the porter, stepped down to the last step of the car. While plaintiff was standing there, the porter, who was standing behind him with a light, said, "All right, sir." Plaintiff then stepped off, and was injured. It was dark, and he could not tell whether the car was moving. It was held that, under the evidence, the question of defendant's negligence was properly submitted to the jury. *Hodges v. Southern R. Co.*, 120 N. Car. 555, 27 S. E. 128, 8 Am. & Eng. R. Cas., N. S., 46.

Very naturally, street railway law is especially rich in cases of this character in which it is held that when a street car has been slowed up in response to a signal, the person signaling the car to stop must be given a reasonable opportunity to get on or off, and the carrier is liable for injuries which he sustains in consequence of the speed of the car being negligently increased while he is in the act of boarding, or alighting from, the car.

Indiana.—*Conner v. Citizens', etc., R. Co.*, 105 Ind. 62, 4 N. E. 441, 26 Am. & Eng. R. Cas. 210, 55 Am. Rep. 177; *Citizens', etc., R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Citizens', etc., R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446.

Kentucky.—*Central, etc., R. Co. v. Rose*, 15 Ky. L. Rep. 209, 22 S. W. 745.

Minnesota.—*Sahlgaard v. St. Paul, etc., R. Co.*, 48 Minn. 232, 51 N. W. 111.

New York.—*Morrison v. Broadway, etc., R. Co.*, 130 N. Y. 166, 29 N. E. 105, affirming 8 N. Y. Supp. 436; *Eppendorf v. Brooklyn City, etc., R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Nichols v. Sixth Avenue R. Co.*, 38 N. Y. 131, 97 Am. Dec. 780.

Pennsylvania.—*Linch v. Pittsburgh Traction Co.*, 153 Pa. St. 102, 25 Atl. 621; *Picard v. Ridge Avenue, etc., R. Co.*, 147 Pa. St. 195, 23 Atl. 566.

Rhode Island.—*Rathbone v. Union R. Co.*, 13 R. I. 709, 13 Am. & Eng. R. Cas. 58.

Texas.—*Christie v. Galveston, etc., R. Co.* (Tex. Civ. App. 1897), 39 S. W. 638. But compare *Schmidt v. North Jersey, etc., R. Co.* (N. J. 1901), 49 Atl. 438.

C. WHEN THE TRAIN OR STREET CAR IS STOPPED.

1. General Rule.

When a railroad train or a street car is stopped for the purpose of setting down or taking up passengers, the carrier should give the passengers a reasonable time to get on or off, before starting the train or car. *Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213, 58 Am. & Eng. R. Cas. 239, 21 L. R. A. 354; *Citizens', etc., R. Co. v. Merl* (Ind. App. 1901), 59 N. E. 491.

2. Allowing Time to Board Railroad Train.

The application of the general rule is illustrated by a number of cases in which railroad companies were held liable for negligently starting trains before intending passengers had been afforded a time reasonably sufficient to enable them to get aboard.

Georgia.—*Poole v. Georgia R., etc., Co.*, 89 Ga. 320, 15 S. E. 321.

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Massachusetts.—Dawson *v.* Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466.

Missouri.—Evans *v.* Interstate, etc., R. Co., 106 Mo. 594, 17 S. W. 489; Swigert *v.* Hannibal, etc., R. Co., 75 Mo. 475, 9 Am. & Eng. R. Cas. 322.

New York.—Hickenbottom *v.* Delaware, etc., R. Co., 122 N. Y. 91, 25 N. E. 279.

Texas.—Texas, etc., R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636; Texas, etc., R. Co. *v.* Brown (Tex. Civ. App. 1900), 58 S. W. 44.

Virginia.—Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

Wisconsin.—Detroit, etc., R. Co. *v.* Curtis, 23 Wis. 152, 99 Am. Dec. 141. An element of negligence in these cases may be the failure of the company to give passengers a reasonable opportunity to buy tickets before the train is started. A railroad company should put tickets on sale a reasonable time before the departure of a train, and, especially if such companies are required by statute to open their ticket offices a specified time before the departure of their trains, persons who wish to purchase tickets may assume that the company will obey the law, or, at least, that it will allow them a reasonable time to buy tickets and board its trains in safety, and a failure to do so, resulting in injury, constitutes actionable negligence. Gulf, etc., R. Co. *v.* Fox (Tex. 1887), 6 S. W. 569, 33 Am. & Eng. R. Cas. 543. Where a passenger was instructed by the conductor of a train to get off at an intermediate station and purchase a ticket, it was held that the company was negligent in not holding the train long enough for him to be able to purchase his ticket and get back on the train. St. Louis, etc., R. Co. *v.* Germany (Tex. Civ. App. 1900), 56 S. W. 586.

Notwithstanding the duty of a railroad company to have a train stand at the station a reasonable time before the hour announced for departure to permit people to enter, the train may, before the arrival of the time when passengers may be expected to get aboard, be moved back and forth as may be required by the convenience of the company in making up and stationing other trains. Flint, etc., R. Co. *v.* Stark, 38 Mich. 714. And where a train has not been fully made up and has not been drawn up to the platform of the station but is standing at a distance therefrom, and it is not customary for passengers to board the train at that point, a passenger who, without being invited to do so, nevertheless boards the car, cannot recover for injuries received while so doing, in consequence of the jolting of the cars in making up the train. Jones *v.* New York, etc., R. Co., 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490. But a passenger who, in pursuance of an established and recognized custom, boards a train which has not been fully made up, and which has not been drawn up to the platform of the station, but is standing at a distance from the platform, is entitled to care on the part of the trainmen to prevent jolting of the cars in making up the train and the carrier is liable to the passenger for injuries sustained while getting on, in consequence of the cars being negligently jolted. See Jones *v.* New York, etc., R. Co., 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490. The duty to hold a train at stations for a time reasonably sufficient for passengers to get on applies only to passengers who present themselves for carriage before the signal to start has been given; if a passenger comes after that signal has been given the train need not be held for the purpose of allowing him to get on. Paulitsch *v.* New York, etc., R. Co., 102 N. Y. 280, 6 N. E. 577, 26 Am. & Eng. R. Cas. 162, reversing 50 N. Y. Super. Ct. 241. In a case in which it appeared that a train came to a full stop at a station and remained standing for a time which was not shown to have been insufficient to enable a passenger, who walked the length of the car and got on the rear platform of the car, to have gotten on by the front platform, where passengers were getting on and off, and to have safely entered the car, and no reason was shown for walking the whole length of the car instead of getting on at the usual place, and the testimony of all the witnesses, except

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the passenger, was that the train started off slowly, it was held that the evidence was insufficient to show negligence on the part of the railroad company. *Houston, etc., R. Co. v. Stewart* (Tex. Civ. App. 1899), 50 S. W. 580. A freight train, with a cab attached for the accommodation of passengers, stopped, for a purpose other than that of taking on passengers, at a place where the train did not usually stop to receive passengers, and the conductor distinctly announced in the hearing of persons assembled that passengers would not get aboard there, but that the train would move on and stop for them at another place. Plaintiff, who did not hear the announcement, attempted to board the train and was injured, in consequence of the starting of the train while he was upon the platform of the cab, and before he could pass or had passed from thence to the inside of the vehicle. Neither the conductor nor any other person engaged in moving the train or controlling its movements was aware that plaintiff intended to get aboard, or that he was endeavoring to do so, at the time he sustained the injury. It was held that he could not recover. *Curry v. Georgia, etc., R. Co.*, 92 Ga. 293, 18 S. E. 422.

3. Allowing Time to Alight from Railroad Train.

That it is the duty of a railroad company to keep a train stationary for a time reasonably sufficient to enable passengers, by the use of due diligence, to get off in safety, is well settled.

United States.—*McSloop v. Richmond, etc., R. Co.*, 59 Fed. 431.

Alabama.—*Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, 12 So. 439, 58 Am. & Eng. R. Cas. 258; *Central R., etc., R. Co. v. Miles*, 88 Ala. 256, 6 So. 696, 41 Am. & Eng. R. Cas. 149.

Arkansas.—*St. Louis, etc., R. Co. v. Person*, 49 Ark. 182, 4 S. W. 755, 30 Am. & Eng. R. Cas. 567.

California.—*Raub v. Los Angeles, etc., R. Co.*, 103 Cal. 473, 37 Pac. 374; *Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213, 58 Am. & Eng. R. Cas. 239, 21 L. R. A. 354.

Georgia.—*Killian v. Georgia R., etc., R. Co.*, 97 Ga. 727, 25 S. E. 384; *Atlanta, etc., R. Co. v. Smith*, 81 Ga. 620, 8 S. E. 446.

Illinois.—*Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578; *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71.

Indiana.—*Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 477, 58 Am. & Eng. R. Cas. 232; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Ohio, etc., R. Co. v. Smith*, 5 Ind. App. 560, 32 N. E. 809.

Kansas.—*Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768.

Kentucky.—*Dawson v. Louisville, etc., R. Co.*, 4 Ky. L. Rep. 801, 11 Am. & Eng. R. Cas. 134.

Louisiana.—*Jones v. Texas, etc., R. Co.*, 47 La. Ann. 383, 16 So. 937; *Lehman v. Louisiana, etc., R. Co.*, 37 La. Ann. 705.

Massachusetts.—*Merritt v. New York, etc., R. Co.*, 162 Mass. 326, 38 N. E. 447.

Michigan.—*McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553, 53 Mich. 724, 52 Am. & Eng. R. Cas. 290; *Stone v. Chicago, etc., R. Co.*, 66 Mich. 77, 33 N. W. 24, 30 Am. & Eng. R. Cas. 600.

Missouri.—*Straus v. Kansas City, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384, 86 Mo. 421, 27 Am. & Eng. R. Cas. 170; *Hannibal, etc., R. Co. v. Clotworthy*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371.

Nebraska.—*Chicago, etc., R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976, 54 Am. & Eng. R. Cas. 640.

New Hampshire.—*Emery v. Boston, etc., R. Co.*, 67 N. H. 434, 36 Atl. 367.

New York.—*McDonald v. Long Island R. Co.*, 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. Rep. 437, affirming 6 N. Y. St. Rep. 691, 43 Hun (N. Y.) 637; *Bartholomew v. New York, etc., R. Co.*, 102 N. Y. 716, 7 N. E. 623, 27 Am. & Eng. R. Cas. 154.

North Carolina.—*Parlier v. Southern R. Co.* (N. Car. 1901), 39 S. E. 961.

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Pennsylvania.—*Leggett v. Western New York, etc., R. Co.*, 143 Pa. St. 39, 21 Atl. 996; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 18 Atl. 759, 41 Am. & Eng. R. Cas. 154, 15 Am. St. Rep. 701; *Pennsylvania R. Co. v. Peters*, 116 Pa. St. 206, 9 Atl. 317, 30 Am. & Eng. R. Cas. 607; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292, 72 Am. Dec. 787.

South Carolina.—*Appleby v. South Carolina, etc., R. Co.*, 60 S. Car. 48, 38 S. E. 237.

Tennessee.—*Southern R. Co. v. Mitchell*, 98 Tenn. 27, 40 S. W. 72.

Texas.—*Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; *Houston, etc., R. Co. v. Moss* (Tex. Civ. App. 1901), 63 S. W. 894; *Martin v. St. Louis, etc., R. Co. of Texas* (Tex. Civ. App. 1900), 56 S. W. 1011; *Texas, etc., R. Co. v. Lee* (Tex. Civ. App. 1899), 51 S. W. 351; *Missouri, etc., R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843; *Houston, etc., R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *Ft. Worth, etc., R. Co. v. Viney* (Tex. Civ. App. 1895), 30 S. W. 252; *Texas, etc., R. Co. v. Wood*, 8 Tex. Civ. App. 462, 28 S. W. 416; *Atchison, etc., R. Co. v. Frier* (Tex. Civ. App. 1893), 22 S. W. 6.

Virginia.—*Norfolk, etc., R. Co. v. Prinnell*, 1 Va. Dec. 626, 3 S. E. 95, 30 Am. & Eng. R. Cas. 574; *Richmond, etc., R. Co. v. Morris*, 31 Gratt. (Va.) 200.

If, before a passenger, who in the exercise of due diligence, has had a reasonably sufficient time to alight from a train, the cars are jolted through the negligence of the employees in making a coupling, the company is liable. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367. It has been held that where a passenger was directed to alight by way of the third car forward of the one in which she was sitting as soon as the train stopped, it became the duty of the carrier to stop the train long enough to enable her, by the use of ordinary care and diligence, to go to the car to which she had been directed, and a failure to do so was a breach of duty entitling her to recover damages occasioned thereby. *Smith v. Chicago, etc., R. Co.*, 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483. The circumstances that as a train approached the station and its speed was reduced, a passenger, with a view of getting off, left his seat and went to the rear platform of the passenger car, and closed the door after him, and that the conductor afterwards went to the front door or into the coach and, not seeing the passenger and his companion, supposed they had left the train and thereupon ordered the train to move on, did not, it has been held, relieve the carrier of liability for its failure to hold the train at the station for a time reasonably sufficient to enable the passenger to alight, in consequence of which he was compelled to alight some five or six hundred yards from the station, sustaining injuries from which he died. *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738, 2 So. 360, 30 Am. & Eng. R. Cas. 564. But in a case in which it appeared that plaintiff, while asleep, was carried by the station at which he had intended to alight and for which he had a ticket to the next station, which was a small station located in the woods at a point where there was a branch track or crossing, but where no people lived, and at which no agent was kept, although trains were required to be stopped there and the time of their arrival registered; that the conductor had no passengers on board for that station; that plaintiff, without notifying the trainmen that he wished or intended to get off at that place, went to the platform at the rear of his car, stepped down on the steps, jumped off on the side opposite to the station building, slipped and fell under the train just as it was started and was injured, it was held that it was proper to direct a verdict for defendant. *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203, 51 N. W. 364, 52 Am. & Eng. R. Cas. 304.

On the ground that a railroad company owes the duty of allowing a reasonable time to alight from its trains to any passenger who wishes to do so, it has been held that the fact that a passenger gets

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off at an intermediate station, instead of at the station called for by his ticket, without informing the conductor of his intention to alight, does not necessarily prevent a recovery for injuries received in consequence of the train not being held long enough for him to get off. *Texas, etc., R. Co. v. Goldman* (Tex. Civ. App. 1899), 51 S. W. 275. But very likely the facts that a passenger has a ticket to a station farther on, and the conductor has not been informed and does not know of his intention to alight at an intermediate station, should be taken into consideration by the jury in determining whether the company was negligent in failing to hold the train at such intermediate station for a time sufficient to enable him to alight. See *Texas, etc., R. Co. v. Goldman* (Tex. Civ. App. 1899), 51 S. W. 275.

It is sufficient if passengers are given a reasonable time to alight from the train in safety, the train need not be kept waiting until they have left the platform at the station. *Louisville, etc., R. Co. v. Ricketts*, 18 Ky. L. Rep. 687, 37 S. W. 952.

4. Allowing Time to Board Street Car.

When a street car is stopped for the purpose of taking on passengers the car should not be started before the passengers have had a reasonable time to board the car.

Illinois.—*North Chicago, etc., R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958, 58 Am. & Eng. R. Cas. 230.

Maryland.—*Central R. Co. v. Smith*, 74 Md. 212, 21 Atl. 706, 48 Am. & Eng. R. Cas. 60.

Minnesota.—*Steeg v. St. Paul, etc., R. Co.*, 50 Minn. 149, 52 N. W. 393, 52 Am. & Eng. R. Cas. 550, 16 L. R. A. 379; *Sahlgard v. St. Paul, etc., R. Co.*, 48 Minn. 232, 51 N. W. 111.

Missouri.—*Bertram v. People's R. Co.* (Mo. 1900), 55 S. W. 1040; *Olfermann v. Union Depot R. Co.*, 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483.

Nebraska.—*Omaha, etc., R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007.

New York.—*Black v. Brooklyn City R. Co.*, 108 N. Y. 640, 15 N. E. 389, 34 Am. & Eng. R. Cas. 526; *Maher v. Central Park, etc., R. Co.*, 67 N. Y. 52, affirming 39 N. Y. Sup. Ct. 155; *Wolfkiel v. Sixth Avenue R. Co.*, 38 N. Y. 49.

Pennsylvania.—*Walters v. Philadelphia Traction Co.*, 161 Pa. St. 36, 28 Atl. 941.

This duty is, of course, equally incumbent upon elevated railways carrying passengers. *McKenna v. North Hudson County R. Co.* (N. J. 1900), 45 Atl. 776. Where a street car was suddenly, and without warning, backed upon plaintiff as she was walking along the track in approaching the car to get on, a judgment for plaintiff was sustained. *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128.

Even though a passenger is not as prompt in boarding a car as he should be, still, if before the car has started, he attempts to board, he may recover for injuries received in consequence of the sudden starting of the car; if the employees in control of the car have knowledge, or in the proper discharge of their duties, ought to have knowledge, of his presence. *Cohen v. West Chicago, etc., R. Co.*, 9 C. C. A. 223, 60 Fed. 698.

5. Allowing Time to Alight from Street Car.

When a street car has been stopped for the purpose of setting down passengers, the car should not be started, or moved either way, until the passengers have been allowed a reasonable time to get off in safety.

United States.—*Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. 557, 58 Am. & Eng. R. Cas. 380.

Alabama.—*North Birmingham, etc., R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

California.—*Wheaton v. North Beach, etc., R. Co.*, 36 Cal. 590.

Colorado.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

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Georgia.—West End, etc., R. Co. *v.* Mozely, 79 Ga. 463, 4 S. E. 324.

Illinois.—Chicago, etc., R. Co. *v.* Mills, 105 Ill. 63, 11 Am. & Eng. R. Cas. 128; Chicago, etc., R. Co. *v.* Mumford, 97 Ill. 560, 3 Am. & Eng. R. Cas. 312.

Louisiana.—Boikens *v.* New Orleans, etc., R. Co., 48 La. Ann. 831, 19 So. 737; Conway *v.* New Orleans, etc., R. Co., 46 La. Ann. 1429, 16 So. 362; Wardle *v.* New Orleans, etc., R. Co., 35 La. Ann. 202, 13 Am. & Eng. R. Cas. 60; Howell *v.* St. Charles, etc., R. Co., 22 La. Ann. 603.

Michigan.—Lacas *v.* Detroit City R. Co., 92 Mich. 412, 52 N. W. 745; Kirchner *v.* Detroit City R. Co., 91 Mich. 400, 51 N. W. 1059; Britton *v.* Street R. Co. of Grand Rapids, 90 Mich. 159, 51 N. W. 276; Werbowlsky *v.* Fort Wayne, etc., R. Co., 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120. See Gardner *v.* Detroit, etc., R. Co., 99 Mich. 182, 58 N. W. 49.

Minnesota.—Cooper *v.* St. Paul, etc., R. Co., 54 Minn. 379, 56 N. W. 42, 58 Am. & Eng. R. Cas. 598; Piper *v.* Minneapolis, etc., R. Co., 52 Minn. 269, 53 N. W. 1060.

Missouri.—Jackson *v.* Grand Avenue R. Co., 118 Mo. 199, 24 S. W. 192; Ridenhour *v.* Kansas City, etc., R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

Nebraska.—Omaha, etc., R. & Bridge Co. *v.* Levinston, 49 Neb. 17, 67 N. W. 887.

New York.—Mulhado *v.* Brooklyn, etc., R. Co., 30 N. Y. 370.

North Carolina.—Asbury *v.* Charlotte, etc., R., etc., Co. (N. Car. 1899), 34 S. E. 654; Morrison *v.* Charlotte, etc., R., etc., Co., 123 N. Car. 414, 31 S. E. 720; Cawfield *v.* Asheville, etc., R. Co., 111 N. Car. 597, 16 S. E. 703.

Pennsylvania.—Fairmount, etc., R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714.

Wisconsin.—Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278, 18 N. W. 17, 16 Am. & Eng. R. Cas. 330.

This rule must also be observed by elevated railways. Baker *v.* Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885; Ferry *v.* Manhattan R. Co., 118 N. Y. 497, 23 N. E. 822, 44 Am. & Eng. R. Cas. 331, affirming 54 N. Y. Super. Ct. 325. A passenger on a street car is entitled to this protection even although the car is stopped for some purpose other than that of allowing passengers to alight. Patterson *v.* Omaha, etc., R. Co., 90 Iowa 247, 57 N. W. 880. And since it is the duty of those in charge of a street car which has been stopped at a regular stopping place, to see and know whether persons are getting on or off by the regular and usual ways before the car is started (see *infra*, VIII), the fact that a passenger, who is injured by the premature starting of the car while alighting, has made no special request to be allowed to get off, does not of itself relieve the carrier from liability; a passenger who attempts to alight from a street car while other passengers are getting off, and is injured by reason of the negligent starting of the car, may recover for the injuries received, although the car was not stopped at his instance, and although he did not ask or obtain permission from those in charge of the car to alight. Chicago, etc., R. Co. *v.* Mills, 105 Ill. 63, 11 Am. & Eng. R. Cas. 128. See Jackson *v.* Grand Avenue R. Co., 118 Mo. 199, 24 S. W. 192; Cawfield *v.* Asheville, etc., R. Co., 111 N. Car. 597, 16 S. E. 703. Possibly, however, the failure of a passenger to signify an intention of alighting may make a case for the jury on the question of contributory negligence. Rathbone *v.* Union R. Co., 13 R. I. 709, 13 Am. & Eng. R. Cas. 58.

6. Allowing Time to Reach Place of Safety.

a. In General.

Undoubtedly a passenger getting on or off a carrier's vehicle must be afforded a reasonable time to reach a place of safety before the vehicle is started. Thus a street car should not be put in motion until a passenger who gets on has had a reasonable time to reach a place of safety. Akersloot *v.* Second Ave-

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nue R. Co., 131 N. Y. 599, 30 N. E. 195, 52 Am. & Eng. R. Cas. 553, 15 L. R. A. 489; *Holmes v. Alleghany Traction Co.*, 153 Pa. St. 152, 25 Atl. 640. And the duty of a street car company to allow passengers a reasonable time to get off its cars is not discharged until the passenger, in the exercise of due diligence, is free of the car. *Finn v. Valley City, etc., R. Co.*, 86 Mich. 74, 48 N. W. 696. A train which carried both freight and passengers was stopped at the platform of the station. The passenger coach did not reach the platform, which in height was nearly even with the floor of the ordinary railroad coaches. The conductor requested plaintiff to enter by way of the baggage car, which stood against the platform, and from there to walk to the rear end of the train to the ladies' car, which was the second from the baggage coach. After assisting her from the platform and when she had begun to walk to the rear the conductor gave the usual signal to start the train. At the moment she was stepping from that car to the next, unassisted by any one, the train moved with a jerk, causing her a misstep, in consequence of which she lost her balance and fell to the ground between the platforms of the adjoining cars and was seriously injured. It was held that the fact showed great negligence and wanton indifference to the safety of passengers and that plaintiff was entitled to recover damages for the injury received. *Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514.

b. Time to Secure Seat.

There is some slight authority to the effect that this duty to allow passengers to reach a place of safety requires that the passenger be allowed a reasonable time to secure a seat in the vehicle. *International, etc., R. Co. v. Copeland*, 60 Tex. 325; *Gulf, etc., R. Co. v. Powers*, 4 Tex. Civ. App. 228, 23 S. W. 325. But, as a general rule, a train or street car may be started, in a proper manner, when a passenger has fairly entered the vehicle and without waiting for him to reach a seat, unless there is some special reason why that should not be done. *Louisville, etc., R. Co. v. Hale*, 19 Ky. L. Rep. 1651, 44 S. W. 213, 10 Am. & Eng. R. Cas., N. S., 73, 42 L. R. A. 293; *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Herbich v. North Jersey, etc., R. Co.* (N. Y. 1900), 47 Atl. 427. And the fact that a woman, who has the assistance of an escort, is encumbered with a number of children and is carrying a basket, is not sufficient to require the trainmen to delay starting the train until she is safely seated. *Louisville, etc., R. Co. v. Hale*, 19 Ky. L. Rep. 1651, 44 S. W. 213, 10 Am. & Eng. R. Cas., N. S., 73, 42 L. R. A. 293. Nor does the fact that the passenger, who is accompanied by and is in the care of her parents, is an infant, call for the application of a different rule. *Herbich v. North Jersey, etc., R. Co.* (N. J. 1900), 47 Atl. 427. Where, however, it was known to the trainmen that a passenger boarding a train was a cripple, compelled to use a crutch and stick, it was held that the railway company was guilty of negligence in starting the train before she had reasonable time to enter the car and take her seat. *Central Texas, etc., R. Co. v. Holloway* (Tex. Civ. App. 1899), 54 S. W. 419.

But while it is true, as a general proposition, that it is not negligence to start a train or street car before a passenger is seated, due care must be observed in putting the vehicle in motion before the passenger has been seated so as not to endanger the passenger, and if such care is not used the carrier is negligent. *Miller v. St. Paul City R. Co.*, 66 Minn. 192, 68 N. W. 862; *Bertram v. People's R. Co.* (Mo. 1900), 55 S. W. 1040; *Dougherty v. Missouri, etc., R. Co.*, 97 Mo. 647, 8 S. W. 900, 37 Am. & Eng. R. Cas. 206; *Dougherty v. Missouri, etc., R. Co.*, 81 Mo. 325, 51 Am. Rep. 239, 21 Am. & Eng. R. Cas. 497, affirming 9 Mo. App. 478; *Gulf, etc., R. Co. v. Powers*, 4 Tex. Civ. App. 228, 23 S. W. 325; *Dickert v. Salt Lake City R. Co.* (Utah 1899), 59 Pac. 95. In a case in which there was evidence tending to show that, before plaintiff had time to take a seat in the car which she had boarded, the train was started with a sudden and violent jerk,

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it was held that the question of defendant's negligence was properly submitted to the jury. *Sheffer v. Louisville, etc., R. Co.* (Ky. 1901), 60 S. W. 403.

D. WHAT CONSTITUTES A REASONABLE TIME.

Whether a reasonable time has or has not been afforded passengers to get on or off the carrier's vehicle must depend upon all the circumstances of each case, as, for example, the number of passengers getting on or off, the age, sex and physical condition of the passengers, and the nature of the landing place. *Smitson v. Southern Pac. Co.* (Ore. 1900), 60 Pac. 907; *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 3 S. E. 301, 30 Am. & Eng. R. Cas. 571; *Southern R. Co. v. Mitchell*, 98 Tenn. 27, 40 S. W. 72. "For instance, a longer time would be required when there are many passengers to alight than when there are but few; in a dark night, with the landing place lighted, than when there is full light; at a difficult place to alight than where it is easy. And, as railroad companies usually carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight." *Keller v. Sioux City, etc., R. Co.*, 27 Minn. 178, 6 N. W. 486. The question as to what constitutes a reasonable time must, therefore, in nearly every case be left to the determination of the jury. *McSloop v. Richmond, etc., R. Co.*, 59 Fed. 431; *Killian v. Georgia R., etc., Co.*, 97 Ga. 727, 25 S. E. 384; *Chicago, etc., R. Co. v. Dinsmore*, 162 Ill. 658, 44 N. E. 887, reversing 62 Ill. App. 473; *Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768; *Louisville, etc., R. Co. v. Harmon*, 23 Ky. L. Rep. 871, 64 S. W. 640; *Moran v. Versailles Traction Co.*, 188 Pa. St. 557, 41 Atl. 652; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 18 Atl. 759, 41 Am. & Eng. R. Cas. 154, 15 Am. St. Rep. 701; *Houston, etc., R. Co. v. Goodyear* (Tex. Civ. App. 1902), 66 S. W. 862. And, in determining the question, the jury may take into consideration, among other circumstances, the evident youth of the passenger (*Ridenhour v. Kansas City, etc., R. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760), the passenger's advanced age and evident physical condition (*Bertram v. People's R. Co.* (Mo. 1900), 55 S. W. 1040; *Hickman v. Missouri, etc., R. Co.*, 91 Mo. 433, 4 S. W. 127), and the fact of the passenger being encumbered with packages or baggage. *Steeg v. St. Paul, etc., R. Co.*, 50 Minn. 149, 52 N. W. 393, 52 Am. & Eng. R. Cas. 550, 16 L. R. A. 379; *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374, 34 Am. & Eng. R. Cas. 422; *Texas, etc., R. Co. v. Born* (Tex. Civ. App. 1899), 50 S. W. 613. But, where a passenger was injured, while boarding an elevated railroad train, by being carried along between the train and a railing twelve inches from the train, and there was no evidence that the railing was defectively constructed, it was held that it was error to charge that, in determining whether the train was held a reasonable time to enable the passenger to get on, the jury had a right to consider whether the railing was reasonably safe. *Evans v. Interstate, etc., R. Co.*, 106 Mo. 594, 17 S. W. 489.

Applying the rule that the question as to whether the time is reasonable is for the jury, it has been held that the mere fact that a train is stopped the usual time is not sufficient to show either negligence on the part of the passenger or due care on the part of the carrier. *Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768. But where special findings of a jury showed that the train stopped three minutes, and nothing appeared from which the inference could reasonably be drawn that the train had not, in the ordinary and natural course of events, stopped a sufficient length of time to allow plaintiff to alight in safety, the court took judicial notice of the fact that, ordinarily, a stop of a passenger train for three minutes at a station, for the purpose of allowing passengers to get on and off the train, is

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reasonable and adequate, and refused to allow a judgment for plaintiff to stand. *Louisville, etc., R. Co. v. Castello*, 9 Ind. App. 462, 36 N. E. 299.

E. STARTING OF VEHICLE AT SIGNAL OF UNAUTHORIZED PERSON.

A carrier, who is himself free from negligence, cannot be held liable to a passenger who is injured by the premature starting of the vehicle in compliance with a signal which is given by an unauthorized person. See *Ferry v. Manhattan R. Co.*, 118 N. Y. 497, 23 N. E. 822, 44 Am. & Eng. R. Cas. 331, affirming 54 N. Y. Super. Ct. 325. Where a train was started when plaintiff was about to alight, in consequence of a signal to start being given by another passenger, and the plaintiff saw the act of the fellow passenger and remonstrated with him, but nevertheless alighted from the moving train, an instruction charging the carrier with liability for a failure to allow plaintiff a reasonable time to alight, without regard to whether the starting of the train was the act of defendant, was held to be erroneous. *Mississippi, etc., R. Co. v. Harrison*, 66 Miss. 419, 6 So. 319, 39 Am. & Eng. R. Cas. 449, 14 Am. St. Rep. 573. But the fact that a signal to start is given by an unauthorized person does not exempt the carrier from liability, if the conductor or agents in charge, by the exercise of due care and diligence, can prevent the moving of the car and thereby prevent injury. *North Chicago, etc., R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958. The conductor of a car, who wished to attend to the collection of fares, requested a person who was riding on the car and who was an employee of defendant street railway company as a conductor, but was off duty at the time, to let plaintiff and her child off at a particular crossing. He agreed to do so, but, after giving the signal to stop, left the car in advance of plaintiff and her child, without giving the starting signal. Plaintiff's child descended in safety from the car steps to the street, and plaintiff herself went as far as the platform steps, when some unauthorized and unknown person gave the starting signal to the motorman. It was held that defendant was liable for the injuries which plaintiff thereby sustained. *Leavenworth, etc., R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

VIII. DUTY TO SEE WHETHER PASSENGERS HAVE GOTTEN ON OR OFF.

A. DIFFERENCE BETWEEN OBLIGATION OF RAILROAD AND STREET RAILWAY COMPANY.

In one respect there is a marked distinction between the duties of ordinary railway companies in taking on and letting off passengers and those of street railway companies. In the case of an ordinary railway company, it is sufficient that passengers are allowed a reasonable time to board, or alight from, a train, and the law does not impose upon the carrier any duty to see and know that every passenger, who intends to do so, has gotten on or off; unless the carrier knows, or has good reason to believe to the contrary, he may act upon the presumption that passengers have availed themselves of the ample time allowed, and gotten on or off the train. But the duty of street railway companies is more onerous. It is not only the duty of the carrier by street cars to keep the car stationary for a time reasonably adequate to enable passengers to get on and off in safety, but he is required to see and know that they have in fact done so. This distinction is based upon the different conditions under which the two kinds of railways are operated. In the case of ordinary railroads, trains are run on schedules. They stop only at designated stations to receive and discharge passengers. The conductor knows in advance how many passengers are to alight at a given station. He may therefore determine with sufficient accuracy what would be a reasonable time for the train to stop to enable passengers for that station to alight, by the exercise of ordinary diligence on their part. The law, therefore, imposes on him the duty of holding the train for such

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reasonably sufficient time. It is not practicable for him to keep a watch upon all the exits from a train of cars. Not infrequently he has other things to do at stations where his train stops. The law, therefore, does not impose on him the duty of seeing and knowing that all of the passengers, intending to get on or off, have done so. But these reasons do not obtain with respect to the ordinary street railways. They have no stations, no regular stopping places, no schedules. The driver or conductor, cannot know beforehand where any passenger intends to alight, or how many passengers desire to get off at any place where he is signaled to stop. When he is signaled to stop, he must then inform himself by looking and seeing as to how many of his passengers desire and intend to alight. Without this he can have no conception of the length of time the car should remain stationary. Having rendered his car immovable by applying the brakes, he has nothing else to do than to see who intends getting off, and to know that they are safely off before the car is again started. It is entirely practicable for him to do this. The only exits are under his immediate observation, and there is no other duty incumbent on him at the time to divert his attention from them and the alighting passengers. *Birmingham v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761; *Anderson v. Citizens', etc., R. Co.*, 12 Ind. App. 194, 38 N. E. 1109; *Leavenworth, etc., R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

B. DUTY OF RAILROAD COMPANIES.

When the train of an ordinary railroad is brought to a standstill for a length of time reasonably sufficient to enable passengers to get on or off by the exercise of due care and diligence on their part, there is no further duty resting upon the trainmen to see and know that every passenger who wishes to alight has done so, or that every person who wishes to take passage is safely on board. *Highland Avenue, etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95; *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708; *Nunn v. Georgia R.*, 71 Ga. 710, 51 Am. Rep. 284; *Raben v. Central, etc., R. Co.*, 73 Iowa 579, 35 N. W. 645, 33 Am. & Eng. R. Cas. 520, 5 Am. St. Rep. 708; *Michigan, etc., R. Co. v. Coleman*, 28 Mich. 440; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Hannibal, etc., R. Co. v. Clotworthy*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371; *Straus v. Kansas City, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384, 86 Mo. 421, 27 Am. & Eng. R. Cas. 170; *Browne v. Raleigh, etc., R. Co.*, 108 N. Car. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544. But compare *Keller v. Sioux City, etc., R. Co.*, 27 Minn. 178, 6 N. W. 486. And certainly a conductor is not bound to be on the lookout for passengers to get on board from both sides of the train when a platform has been provided for that purpose on one side only, and he is not at fault for not discovering a passenger who attempts to get on from the wrong side. *Michigan, etc., R. Co. v. Coleman*, 28 Mich. 440. But possibly this rule has no application where a train, instead of being stopped, is merely slowed up to take on or set down passengers. It has been said, in effect, that when a reasonable opportunity to get on or off a train is not afforded passengers by stopping the train and holding it stationary, but they are expected to do so while the train is moving at a low rate of speed, the invitation thus conveyed implies, at least, an assurance that the momentum will not be increased until all persons who wish to board, or alight from, the train have done so, and imposes a correlative duty on those in charge of the train not to increase the speed without knowing that no person intending to act on the invitation is so situated as to be imperiled thereby; in other words, it is not sufficient merely to maintain the low rate of speed sufficiently long for persons with diligence to get on or off. *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708.

While there is no obligation upon those in charge of a train to see that each intending or alighting passenger has gotten on or off the

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train when stopped for that purpose, if they in fact know, or have reason to know, that a passenger is in the act of boarding or alighting, and, in disregard of the probable peril in which such passenger will be placed, cause the train to move, and thereby inflict an injury, the carrier will be liable. *Highland Avenue, etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56; *Luse v. Union Pac. R. Co.*, 57 Kan. 361, 46 Pac. 768; *Louisville, etc., R. Co. v. Harmon*, 23 Ky. L. Rep. 871, 64 S. W. 640; *Straus v. Kansas City, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 385, 86 Mo. 421, 27 Am. & Eng. R. Cas. 170; *Swigert v. Hannibal, etc., R. Co.*, 75 Mo. 475, 9 Am. & Eng. R. Cas. 322; *Browne v. Raleigh, etc., R. Co.*, 108 N. Car. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544. It has been held that if a passenger who has alighted from the train with part of his baggage, re-enters the train with the knowledge of the conductor for the purpose of getting the remainder of his baggage, it is the duty of a conductor to hold the train a reasonable time to allow him to get the baggage and alight from the train. *Texas, etc., R. Co. v. Born* (Tex. Civ. App. 1899), 50 S. W. 613.

C. DUTY OF STREET RAILWAY COMPANIES.

Street railways carrying passengers do not discharge their full duty in taking on and letting off passengers by merely waiting, before starting the vehicle, for a length of time which is reasonably sufficient to enable passengers, who are ordinarily prompt, to get on or off; it is also the duty of the servants in charge of the car to use due care and diligence to see and know that no passenger is in the act of boarding or alighting, or is otherwise in a position which will be rendered dangerous by a movement of the car.

United States.—*Dudley v. Front Street, etc., R. Co.*, 73 Fed. 128.

Alabama.—*Highland Avenue, etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95; *Birmingham, etc., R. Co. v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761.

California.—*Spearman v. California, etc., R. Co.*, 57 Cal. 432, 8 Am. & Eng. R. Cas. 192.

Illinois.—*North Chicago, etc., R. Co. v. Cook*, 144 Ill. 551, 33 N. E. 958; *Chicago, etc., R. Co. v. Mumford*, 97 Ill. 560, 3 Am. & Eng. R. Cas. 312.

Indiana.—*Citizens', etc., R. Co. v. Merl* (Ind. App. 1901), 59 N. E. 491; *Anderson v. Citizens', etc., R. Co.*, 12 Ind. App. 194, 38 N. E. 1109.

Kansas.—*Leavenworth, etc., R. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

Michigan.—*Britton v. Street R. Co. of Grand Rapids*, 90 Mich. 159, 51 N. W. 276.

Nebraska.—*Omaha, etc., R. & Bridge Co. v. Levinston*, 49 Neb. 17, 67 N. W. 887.

North Carolina.—*Cawfield v. Asheville, etc., R. Co.*, 111 N. Car. 597, 16 S. E. 703.

There is, of course, especial reason for exacting this duty of street railway carriers which convey passengers by horse cars. *Birmingham, etc., R. Co. v. Smith*, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761. But the obligation is not imposed upon carriers by horse car alone. It is imposed upon every carrier, regardless of the motive power, that is operated under the conditions peculiar to street railway companies. *Highland Avenue, etc., R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 48 Am. & Eng. R. Cas. 56, 13 L. R. A. 95.

Ordinarily, only passengers who enter or leave a car by the regular and usual way are entitled to have the driver or conductor exercise care to see that they are not in a position of danger when the car is started. See *People's, etc., R. Co. v. Green*, 56 Md. 84, 6 Am. & Eng. R. Cas. 168. A boy, without indicating to those in charge of a street car, which had stopped for the purpose of letting off a passenger, that he intended to take passage, attempted to get on by the front platform, and, while he was in the act of doing so, the car was started and he was injured. On the ground that no negligence on

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the part of the carrier appeared, a judgment of nonsuit was sustained. *Pitcher v. People's, etc., R. Co.*, 154 Pa. St. 560, 26 Atl. 559; *Pitcher v. People's, etc., R. Co.*, 174 Pa. St. 402, 34 Atl. 567. The circumstances of the case may, however, be such that even passengers who enter or leave the car by a way other than the regular and usual one may be entitled to this protection. Thus where a passenger who, having paid his fare, was obliged to stand on the front platform owing to the crowded condition of the car, and, the car being derailed, had gotten off at the request of the driver to help in getting the car on the track, was injured, while getting on the front platform again by stepping over a guard or enclosure three feet high, in consequence of the car being started by the driver without signal or warning, it was held that, in view of the circumstances of the case, there was an obligation on the part of the driver to see that the passenger had an opportunity to get on the car again before it was started, and if he saw, or, by the exercise of proper care, might have seen the position of the passenger, and thereby have avoided the injury, the carrier was liable. *People's, etc., R. R. Co. v. Green*, 56 Md. 84, 6 Am. & Eng. R. Cas. 168.

Of course if the servants of a street railway have knowledge that a passenger is in the act of getting on or off when a car is started, the carrier will be liable on the same principle that ordinary railroad companies are held liable under similar circumstances. *Jackson v. Grand Avenue R. Co.*, 118 Mo. 199, 24 S. W. 192.

IX. ANNOUNCEMENT OF STATIONS OR STOPPING PLACES.

In some states it has been provided by statute that railroad companies shall have the names of stations announced as they are approached. Ky. Stat. 1894, sec. 784; *Dawson v. Louisville, etc., R. Co.*, 4 Ky. L. Rep. 801, 11 Am. & Eng. R. Cas. 134; 1 How. Ann. Stat. Mich. sec. 3417; *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203, 51 N. W. 364, 52 Am. & Eng. R. Cas. 304; *Shannon's Tenn. Code*, sec. 3070; *Louisville, etc., R. Co. v. Collier* (Tenn. 1900), 54 S. W. 980. And in other states in which there seem to be no statutes on the subject, it has frequently been declared by the courts that, to enable passengers to leave the trains at the places of their destination, it is the duty of railroad companies to have the names of the different stations announced as the trains approach or arrive at the stations. *Dorrah v. Illinois, etc., R. Co.*, 65 Miss. 14, 3 So. 36, 30 Am. & Eng. R. Cas. 576, 7 Am. St. Rep. 629; *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738, 2 So. 360, 30 Am. & Eng. R. Cas. 564; *Southern Pac. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Case v. Delaware, etc., R. Co.*, 191 Pa. St. 450, 43 Atl. 319. It would seem, however, that, in the absence of a statute requiring the arrival of trains at stations to be announced, the mere failure to announce a station is not of itself negligence, but that the question of the carrier's negligence must in each case be determined by the jury. *Houston, etc., R. Co. v. Goodyear* (Tex. Civ. App. 1902), 66 S. W. 862. See *Central Texas, etc., R. Co. v. Hoard* (Tex. Civ. App. 1898), 49 S. W. 142. It has been held that although a passenger, on boarding a street car, notifies the conductor of the place where she wishes to get off, it is sufficient for the conductor to make a reasonable stop at that place, and, in the absence of a custom to call out the names of the street, he is under no obligation to give the passenger express notice that the place has been reached, although the fact of the notice having or not having been given is a circumstance which may be taken into consideration as bearing upon the questions of negligence and contributory negligence. *Robinson v. Northampton, etc., R. Co.*, 157 Mass. 224, 32 N. E. Rep. 1.

It certainly is not necessary that a personal warning be given to each individual passenger. *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *St. Louis, etc., R. Co. v. McCullough* (Tex. Civ. App. 1895), 33 S. W. 285. And as a general rule, the promise of an employee of a railroad company to give a passenger

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special notice of the arrival of a train at a station, not being within the scope of the employee's authority, does not bind the carrier. *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324; *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247. There may, however, be an exception to this rule where the passenger is in need of special notification, as, for example, when the whole attention of a woman passenger is occupied with a sick child in her care, and the conductor, at the time of making the promise, knows of the situation of the passenger. See *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. 247. In a case in which the announcement of the station was made upon the approach of the train, but the train was stopped at a water tank before reaching the station, and a passenger, who was about to alight under the impression that the station had been reached, was informed by an employee of the company that the station had not been reached, directed to take her seat, and assured that he would notify her of the arrival of the train at the station, it was held that the question was for the jury as to whether the passenger was, under the circumstances, entitled to be notified when the train reached the station. *Missouri, etc., R. Co. v. Miles*, 20 Tex. Civ. App. 570, 50 S. W. 168.

X. AWAKING SLEEPING PASSENGERS.

The duty of railroad companies to notify passengers that their stations have been reached, is discharged, except as to passengers occupying berths in sleeping cars, by announcing the names of the stations, and they are under no obligation to awaken sleeping passengers. *Nichols v. Chicago, etc., R. Co.*, 90 Mich. 203, 51 N. W. 364, 52 Am. & Eng. R. Cas. 304; *Fisher v. Paxson*, 182 Pa. St. 457, 38 Atl. 407, 8 Am. & Eng. R. Cas., N. S., 516; *Houston, etc., R. Co. v. Cohn* (Tex. Civ. App. 1899), 53 S. W. 698; *Texas, etc., R. Co. v. Alexander* (Tex. Civ. App. 1895), 30 S. W. 1113; *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496. Even although the conductor of a train may have promised a passenger to awaken him when his station is reached, the carrier ordinarily is not responsible for carrying the passenger past his station in consequence of the failure of the conductor to keep his promise. *Nunn v. Georgia R.*, 71 Ga. 710, 51 Am. Rep. 284; *Missouri, etc., R. Co. of Texas v. Kendrick* (Tex. Civ. App. 1895), 32 S. W. 42. It has been so held in a Mississippi case in which it appeared that a passenger who got on a train while sick with a fever, without making his condition known before or on entering the train, notified the conductor that he was sick and drowsy and wished to sleep, and was promised by the conductor that he should be awakened when his station was reached. *Sevier v. Vicksburg, etc., R. Co.*, 61 Miss. 8, 18 Am. & Eng. R. Cas. 245, 48 Am. Rep. 74. But this case was distinguished by the same court in a later case in which it appeared that a passenger who was sick and unable to care for himself, had been received as a passenger by the ticket agent and conductor, with knowledge of his condition. It was held that, under the circumstances, the conductor was bound to exercise care to see that the passenger should be put off at his station, and if he was, through weakness and drowsiness, unconscious when the station was reached, the carrier was liable for the conductor's negligence in failing to awaken him, and for carrying him to a station beyond his destination, in consequence of which, and the absence of the attention and care to which he was entitled, his illness was increased so that he died. *Weightman v. Louisville, etc., R. Co.*, 70 Miss. 563, 12 So. 586, 35 Am. St. Rep. 660, 19 L. R. A. 671.

Passengers occupying berths in sleeping cars are entitled to be awakened a reasonable time before their stations are reached so as to enable them to get ready to leave the train. *Pullman Palace-Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356; *McKeon v. Chicago, etc., R. Co.*, 94 Wis. 477, 69 N. W. 175, 8 Am. & Eng. R. Cas., N. S., 219, 59 Am. St. Rep. 910, 35 L. R. A. 252.

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XI. ASSISTING PASSENGERS TO BOARD OR ALIGHT.

There is no rule of law requiring railroad companies or other passenger carriers to assist passengers in every case to get on or off their vehicles. *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 3 S. E. 301, 30 Am. & Eng. R. Cas. 571. Nor can it, on the other hand, be stated as an invariable rule that carriers owe no duty to their passengers in this respect. *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368. Whether due care for the safety of passengers requires carriers to assist passengers to get on and off their vehicles must depend upon the circumstances of each particular case, as, for example the age and physical condition of the passenger, the difficulties of boarding or alighting, etc. (see *Alexandria v. Herndon*, 87 Va. 193, 12 S. E. 289, 15 Va. L. J. 118), and is properly left to the determination of the jury. *Allender v. Chicago, etc., R. Co.*, 43 Iowa 276; *Brodie v. Carolina, etc., R. Co.*, 46 S. Car. 203, 24 S. E. 180; *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 3 S. E. 301, 30 Am. & Eng. R. Cas. 571; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

Ordinarily, a carrier who has provided safe and suitable means for entering and alighting from the vehicle and has stopped the vehicle in a proper position to enable passengers to avail themselves of those means, is not bound to assist passengers to get on and off. *Furgason v. Citizens', etc., R. Co.*, 16 Ind. App. 171, 44 N. E. 936; *Raben v. Central, etc., R. Co.*, 73 Iowa 579, 35 N. W. 645, 33 Am. & Eng. R. Cas. 520, 5 Am. St. Rep. 708; *Jarmy v. Duluth, etc., R. Co.*, 55 Minn. 271, 56 N. W. 813; *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599. Thus, it has been held that where a passenger goes upon a train without first notifying the conductor of his sickness and inability to care for himself and stipulating for assistance, no duty rests upon the carrier to furnish him necessary assistance in alighting. *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478. Where a train was run by a station in consequence of the failure of the air brakes to work, and the trainmen were engaged in putting on the hand brakes, a passenger who, to avoid being carried past her destination, alighted from the moving train, did not, it has been held, establish negligence on the part of the company by showing that she was not assisted to alight. *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156, 44 N. W. 1054, 20 Am. St. Rep. 511.

It may, however, be the duty of a carrier to assist passengers in getting on or off the carrier's vehicle in some cases (*Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 58 Am. & Eng. R. Cas. 232; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, 15 Va. L. J. 118), as, for example, when the fact that a passenger needs assistance is known to the carrier. *Madden v. Port Royal, etc., R. Co.*, 41 S. Car. 440, 19 S. E. 951, 20 S. E. 65. See *Doolittle v. Southern R. Co.*, 62 S. Car. 130, 40 S. E. 133, ante, p. 105. If a carrier voluntarily accepts a passenger, knowing that, by reason of sickness or physical infirmities, he is incapable of caring for himself, it may be the duty of the carrier to give him necessary assistance. *Furgason v. Citizens', etc., R. Co.*, 16 Ind. App. 171, 44 N. E. 936; *International, etc., R. Co. v. Gilmer*, 18 Tex. Civ. App. 680, 45 S. W. 1028. And it has been held that where the conductor in charge of a train at the place where the passenger gets on is notified that the passenger is feeble and will require assistance, and he promises to inform the next conductor and says that it will be all right, the company is charged with notice, and the passenger is not chargeable with contributory negligence in failing to notify the next conductor of her condition and need of assistance. *Foss v. Boston, etc., R. Co.*, 66 N. H. 256, 21 Atl. 222, 47 Am. & Eng. R. Cas. 566, 49 Am. St. Rep. 607, 11 L. R. A. 367. The duty

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to render assistance to passengers may arise when it is especially difficult to board or alight from the carrier's vehicle. Thus, it has been held that where a woman passenger, who was incumbered with heavy clothing and baggage, was compelled to alight, on a dark night during a snow storm, at a station where there was no platform, it was the duty of the carrier to assist her to alight. *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, 15 Va. L. J. 118. Where a train is not stopped at the platform of the station, but at a place which is unsuitable or unsafe for the purpose of discharging a passenger it may be the duty of the carrier to give a passenger such instruction and assistance as will enable him to alight and reach the station in safety. *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451, 1 L. R. A. 157. For example, when a train was not stopped at the regular place for taking on and setting down passengers but farther on at a place where the track was considerably higher than the ground at the side of the track, and where plaintiff, a woman, could not get on the train without assistance, it was said that it was the duty of the company to render her, by its servants, such assistance as may have been necessary. *Western, etc., R. Co. v. Voils*, 98 Ga. 446, 26 S. E. 483. And when no platform is provided at a station and the only means of getting on and off is a movable stool or box, it may be the duty of the carrier to offer passengers assistance so that the use of the appliance may be rendered safe. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 37 Am. & Eng. R. Cas. 82, 3 L. R. A. 368; *McDermott v. Chicago, etc., R. Co.*, 82 Wis. 246, 52 N. W. 85. It has been said that if a passenger on a railroad train informs the trainmen that she will need assistance in alighting, and they promise to assist her, it is their duty to render her the promised assistance. *St. Louis, etc., R. Co. v. Baker* (Ark. 1900), 55 S. W. 941. But the effect of a promise by a carrier's servant to assist a passenger is probably governed by the same principles as promises to notify passengers specially that a station has been reached or to awaken them. As has been shown, the servant's promise does not bind the carrier in either of these cases. See, *supra*, IX and X. By analogy, the mere fact that a servant has promised to assist a passenger to board the carrier's vehicle does not make the carrier liable for a failure of the servant to give the promised assistance. And there is some authority for this view. It has been said that all assistance which a conductor may extend to women without escorts, or who are encumbered with children, or to persons who are sick, and ask his assistance in getting on and off trains, is purely a matter of curtesy, and not at all incumbent upon him in the line of his public duty. *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478. And it has been held that although a conductor promises to assist a passenger to alight, the company is not bound thereby and is not liable for a failure to give the promised assistance. *St. Louis, etc., R. Co. v. McCullough* (Tex. Civ. App. 1895), 33 S. W. 285. In a case in which the trial court charged that the fact that the porter on a train agreed to assist plaintiff, who was infirm and weak in her hands on account of rheumatism, to alight from the train, would not affect defendant's liability in any way, a judgment for defendant was sustained on the ground that the evidence wholly failed to show such a state of facts as would require the rendering of assistance to plaintiff. *Daniels v. Western, etc., R. Co.*, 96 Ga. 786, 22 S. E. 956.

XII. NOTIFYING PASSENGERS OF STARTING OF TRAIN.

In the absence of a statute requiring a signal of the starting of a train to be given by bell or whistle, if a train be stopped for a time reasonably sufficient for passengers, who exercise due diligence, to board or alight, it will not be negligence per se to put the train in motion again without giving notice by signal of the intention to do so. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78. If,

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after passengers have been allowed a reasonable time to get on or off, a train moves off without giving any signal, and a passenger is then in the act of alighting, none of the employees connected with the train knowing of his delay or of his exposed position, and he is injured in consequence of the movement of the train, the company is not liable for the consequences. *Atlanta, etc., R. Co. v. Dickinson*, 89 Ga. 455, 15 S. E. 534. It has been held that where a train has been stopped at a wood station, only for the purpose of taking on wood, the carrier is under no duty to passengers on the train to inform them, by signal, that the train will start. *Malcom v. Richmond, etc., R. Co.*, 106 N. Car. 63, 11 S. E. 187, 44 Am. & Eng. R. Cas. 379. The failure of a carrier to notify passengers of the starting of a train may, however, be of importance as bearing upon the question of the carrier's negligence. Plaintiff attempted to get up on a train which was standing still at a station and was partly filled with passengers. As the plaintiff stepped up on the steps of the car the train, without any signal or notice and without any examination by those in charge to ascertain whether any one was getting on or off, was started with a violent jerk, which threw the plaintiff from the car. It was held that the question of negligence was for the jury. *Keating v. Railroad Company*, 49 N. Y. 673.

When the starting of a train is announced by signal or otherwise, the announcement should be made a reasonable time before the train is started so that passengers who are in the act of getting on or off may have an opportunity to reach a place of safety. *Texas, etc., R. Co. v. Mayfield* (Tex. Civ. App. 1900), 56 S. W. 942.

XIII. DIRECTIONS AS TO BOARDING TRAINS.

It is the duty of a railroad company not to mislead the public by announcements, and if, because of a breach of this duty, a passenger is led to board the wrong train, an action will lie. *Flint, etc., R. Co. v. Stark*, 38 Mich. 714. And it is negligence for the servants of a railroad company to tell passengers to get aboard a train which is not ready for their reception but which is to be drawn up a few feet to get it in the proper place for taking on passengers. *Detroit, etc., R. Co. v. Curtis*, 23 Wis. 152, 99 Am. Dec. 141.

XIV. LIABILITY FOR ACT OF FELLOW PASSENGER.

It has been held that a passenger on a street car who was injured, while alighting, in consequence of being pushed and jostled by other passengers, the conductor being at the time on the ground engaged in assisting the passenger's child to alight, had no action against the carrier. *Furgason v. Citizens', etc., R. Co.*, 16 Ind. App. 171, 44 N. E. 936.

XV. MISLEADING INVITATIONS TO ALIGHT.

A. IN GENERAL.

The obligation of railroads to exercise care for the safety of passengers, requires that they should be careful to avoid doing anything which is calculated to mislead passengers as to the proper time and place for alighting. If a passenger is reasonably induced to believe, from the conduct of those in charge of a train when taken in connection with all the circumstances, that he is invited to alight, and if, in the exercise of due care and caution, he undertakes to do so and is injured by reason of the place being inappropriate and unsafe, or by reason of the starting of the train while he is in the act of getting off, the carrier is chargeable with responsibility for its negligence. The invitation may consist, in exceptional cases, of the stopping of the train without an announcement of the passenger's station, or of the announcement of the station coupled with a slowing up of the train, but it usually consists of the announcement of the station, the subsequent stopping of the train, and the failure of the carrier to warn the passengers against, or otherwise preventing them from, alighting. In these cases the negligence of the carrier must depend

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upon all the facts and circumstances of the case, as, for example, whether the station had been announced, whether the train was brought to a standstill or merely slowed up, the circumstances under which the stop was made or speed decreased and whether the stop or low rate of speed was for a long or short period, whether the stopping place was safe or unsafe, whether it was day or night, and, if night, whether the stopping place was lighted, whether the passenger was familiar with the route and the practices of the carriers, etc. See *Hooks v. Alabama, etc., R. Co.*, 73 Miss. 145, 18 So. 925. The question of the carrier's negligence must, therefore, in nearly every case be left to the determination of the jury. *Hooks v. Alabama, etc., R. Co.*, 73 Miss. 145, 18 So. 925; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384; *Miller v. East Tennessee, etc., R. Co.*, 93 Ga. 630, 21 S. E. 153. The extent to which each case turns on its peculiar facts, renders futile any effort to lay down any general rules, and nothing more than a grouping and setting forth of the cases under convenient headings will be attempted.

B. ANNOUNCING NAME OF STATION.

Generally speaking, the announcement of the name of a station, being usually intended to inform the passengers that the train is approaching the point of their destination so that they may prepare to get off when the train stops, is not of itself an invitation to alight. *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411; *England v. Boston, etc., R. Co.*, 153 Mass. 490, 27 N. E. 1; *Minock v. Detroit, etc., R. Co.*, 97 Mich. 425, 56 N. W. 780. Where the name of a station was announced, and the door of the coach was opened and fastened back, but the train did not come to a stop, it was held that there was no negligence on the part of the carrier which would charge it with liability to a passenger who was injured in alighting from the train while it was still moving. *England v. Boston, etc., R. Co.*, 153 Mass. 490, 27 N. E. 1. In an action by a passenger to recover for injuries sustained in falling from the platform of a car, where she had gone as the train approached her station and after the name of the station had been announced, but while the train was still in motion, the only act connecting defendant with plaintiff's injuries was the announcement, as required by statute, of the name of the station, and that a change of cars was to be made. It was held that there was no negligence on the part of defendant which could charge it with liability. *Payne v. Nashville, etc., R. Co.* (Tenn. 1900), 61 S. W. 86. But in order to charge the carrier with negligence in cases of this class it is not always necessary that the train should actually be stopped; if the train is slowly moving so that it appears to a passenger, who is in the exercise of due care, that it has stopped, then, for all practical purposes, the case is the same as if the train has actually stopped. *Smitson v. Southern Pac. Co.* (Ore. 1900), 60 Pac. 907, citing *Bartholomew v. New York, etc., R. Co.*, 102 N. Y. 716, 7 N. E. 623, 27 Am. & Eng. R. Cas. 154. Where it was alleged that a passenger, after boarding a train to be carried to B., notified defendant's employees that he had never before ridden on a train, and asked that he should be informed when the train arrived at his station; that he was instructed to alight when the station should be announced; that, before reaching the station and while the train was in full motion, an employee of defendant entered the coach in which the passenger was riding and called out, "All out for B.;" that he went upon the platform, and, immediately, the brakes were applied, the speed of the train checked, and he was hurled from the platform, mangled and killed; it was held that the question of defendant's negligence was for the jury. *Doolittle v. Southern R. Co.*, 62 S. Car. 130, 40 S. E. 133, ante, 105.

C. STOPPING TRAIN.

To charge a railroad with liability in cases of this character it is not always necessary that the name of the station should have been announced. About the time when the train upon which deceased

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was a passenger usually arrived at the station where he was to get off, and at the place where the signal whistle for the station was usually sounded; the engineer caused the customary signal to be given and applied the brakes, but the brakes did not stop the train and it ran by the station and was stopped on a trestle bridge, three hundred and eighty-five feet beyond the usual stopping place. The night was dark and there were no lights about the place where the train was stopped, and the length of the stop was about that ordinarily made at small passenger stations. The deceased stepped from the car in which he was sitting and fell through the bridge. The station had not been called at the time the deceased left the train, but there was evidence that it was not the custom of the company's employees to call the name of the station. A finding of negligence on the part of the company was sustained. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234, 49 Am. Rep. 168. But it has on the other hand been held that where a train was stopped a short distance from the station to allow a train bound in the opposite direction to pass, and nothing was done by the carrier's servants to induce passengers to leave the train at that place, the carrier was not liable to a passenger who got off and was injured by falling into a cattle guard some distance from the train. *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.) 387, 87 Am. Dec. 668.

D. ANNOUNCING STATION AND STOPPING TRAIN.

1. General Rule.

As a general rule it may be said that if a train, shortly after the name of a station is announced, is brought to a full stop, a passenger may safely conclude, in the absence of notice, that the train has arrived at the station, unless the surroundings and circumstances are such as would show to a reasonably careful and prudent man that the train has not reached the proper landing place, and the passenger who, acting under a reasonable belief that the train has stopped at the point of his destination and exercising ordinary care, endeavors to get off, may recover for injuries received in consequence of the dangerous character of the place (*Richmond, etc., R. Co. v. Smith*, 92 Ala. 237, 9 So. 223), or a sudden movement of the train without notice. *Smith v. Georgia, etc., R. Co.*, 88 Ala. 538, 7 So. 119, 41 Am. & Eng. R. Cas. 143; *Ward v. Chicago, etc., R. Co.*, 165 Ill. 462, 46 N. E. 365, reversing 61 Ill. App. 530; *Hooks v. Alabama, etc., R. Co.*, 73 Miss. 145, 18 So. 925. If, however, the surroundings and circumstances are such as would inform a man of ordinary care and prudence that the train has not reached the proper and usual place, the passenger is not justified in alighting, and injuries received in so doing must be attributed to accident or the passenger's negligence. *Smith v. Georgia, etc., R. Co.*, 88 Ala. 538, 7 So. 119, 41 Am. & Eng. R. Cas. 143, 16 Am. St. Rep. 63.

Railroads have frequently been held liable for injuries received by a passenger in alighting from a train in the dark, after the station has been announced and the train stopped, without any warning being given the passengers that the train has not stopped at the station. *Louisville, etc., R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107; *Southern Kansas R. Co. v. Pavey*, 48 Kan. 452, 29 Pac. 593; *Philadelphia, etc., R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 44 Am. & Eng. R. Cas. 345; *International, etc., R. Co. v. Eckford*, 71 Tex. 276, 8 S. W. 679; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384. See *Brooks v. Boston, etc., R. Co.*, 135 Mass. 21, 16 Am. & Eng. R. Cas. 345. But while the circumstance that it is dark, so that the passenger is not able to see that the train has not stopped at the station is often of controlling importance in cases of this kind, still, even in the daytime, the circumstances may be such that the announcement of a station, and the subsequent stopping of the train may be taken as an invitation to alight, and justify a recovery for injuries received in so doing. See ante, this note, section V.

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2. Injury to Passenger in Consequence of Dangerous Character of Stopping Place.

In some of these cases the passenger was injured in consequence of the unsuitable and dangerous character of the stopping place. Thus it has been held where the conductor of a train announced the name of the next station, and the train was stopped before arriving at the station, but no notice was given to the passengers that it had not reached the station, nor any request or direction given them to retain their seats, and a passenger stepped off in the darkness of the night, falling through the bridge upon which the train was standing, the negligence of the carrier was a question for the jury. *Philadelphia, etc., R. Co. v. Edelstein* (Pa. 1889), 16 Atl. 847; *Philadelphia, etc., R. Co. v. McCormick*, 124 Pa. St. 427, 16 Atl. 848. Where it was alleged that defendant's porter announced the name of a station, and opened the door to allow passengers to get on and off, and the train thereupon stopped; and plaintiff, thinking the station had been reached, got off, as he supposed, upon the platform, when in fact the train had not reached the station, but had stopped on a trestle; and, it being nighttime, and there being no lights, plaintiff, although exercising due care at the time, stepped out and fell into an excavation containing water, whereby he sustained bodily injuries; it was held that negligence on the part of defendant was sufficiently alleged. *Missouri, etc., R. Co. of Texas v. Overfield* (Tex. Civ. App. 1898), 47 S. W. 684. Where the conductor passed through a car and announced that the passengers would change cars at Wawa, and soon after the car stopped, not at Wawa, but on a bridge, and the plaintiff, it being dark, stepped off and was killed, it was held that the question of defendant's negligence was for the jury, the court observing that "the deceased had a right to suppose that the train had stopped at the station. Having stopped at a place of peril for passengers to alight at a time when they had a right to suppose from the notice previously given that the train had reached the station, proper attention to the safety of the passengers would have required some warning to them to retain their seats." *Philadelphia, etc., Company v. McCormick*, 124 Pa. St. 434, 16 Atl. 848. In the case of *Columbus & Indianapolis R. Co. v. Farrell*, 31 Ind. 408, the plaintiff was on the car of the defendant railroad. The night was dark. The conductor stopped the train and announced the name of the station, "Cumberland." Plaintiff could not see whether there was any platform or not, or where he was going to alight, but in good faith, relying on the announcement made by the conductor, stepped off in the dark into a culvert twenty feet deep and was injured. The supreme court of Indiana in passing upon the question of contributory negligence in that case, by approving the instructions, say: "If the plaintiff did not alight from the train until it had been fully stopped, nor until the defendant's servants had announced the name of the station, or it had been announced from the proper and usual place of making such announcements, he had the right to believe that the train had reached a proper stopping place and that he could safely alight, and if he did then alight and did so without knowing the danger of the place; and in consequence of the darkness of the night he had no reasonable opportunity of ascertaining the danger, and he was injured in so alighting, he will be entitled to a verdict." The train on which plaintiff was a passenger was stopped at a street crossing a short distance from plaintiff's station, in response to a signal by a crossing tender of defendant, given to prevent the train from reaching the station at the time when a freight train, going in the opposite direction, would pass on a track between the train and the station. The conductor of the train, having no warning of the intended stop or of its cause, promptly proceeded to ascertain the cause, and, having done so, caused the train to move slowly to the station. The stop was but momentary. It was dark, and there was no moon. Plaintiff, thinking the station had been reached, got out, and was injured by the freight train. It was, and long had been, the custom for pas-

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sengers to board and leave trains at the station where plaintiff supposed the train had stopped on both sides, and plaintiff had been accustomed to getting on the side on which he alighted when he was injured. In plaintiff's action to recover for the injuries sustained, he had judgment, and the judgment was sustained on the ground that the question of defendant's negligence was for the jury. *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 1 Atl. 9, 51 Am. Rep. 602, note. On the approach of a train to the station, a porter called out the name of the station and the train was brought to a standstill. The plaintiff, a season-ticket holder, accustomed to stop there, stepped out of the carriage in which he was seated, and falling upon an embankment was injured. The train had overshot the platform. It was night and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the train was to be backed. Brett, J., said: "I agree that to call out the name of the station, before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver has overshot the station, and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events the jury may from the facts infer negligence." *Weller v. London, etc., R. Co.*, L. R., 9 C. P. 126, 8 Moak's Eng. 441. In another English case, the action was brought by the executrix and wife to recover for injuries suffered by her husband which resulted in his death. The train on which he was a passenger had to pass through a tunnel before reaching the main platform. There was within the tunnel a platform, similar to but narrower than the main platform. The train went partially up to the main platform and stopped, the last two carriages remaining in the tunnel, the last but one opposite the small platform, and the last, in which the deceased was riding, opposite a heap of rubbish lying near the track. A passenger, who had alighted on the platform from the carriage next to the last, found the deceased lying on the heap of rubbish fatally injured. There was no light in the tunnel, and it was filled with steam. The name of the station had been called in the usual way. It was ruled, on appeal from the exchequer chamber to the house of lords, that it might be reasonably inferred that the deceased, having heard the name of the station called, and finding that the train had stopped, got out of the carriage supposing that he would alight on the platform, and that the evidence furnished matter on which it was necessary to take the opinion of a jury. *Bridges v. North London, etc., R. Co.*, L. R., 6 Q. B. 377, 2 L. R. 7 H. L. 213.

3. Injury to Passenger by Movement of Train.

In yet other cases of this character the injury to the passenger resulted from the starting of the train while he was in the act of alighting. Plaintiff was a passenger on defendant's road. When the train had arrived within a short distance of the destination, the brakeman called out the name of the station. The train stopped a few moments at a crossing of another road, short of the station. The night was dark. The plaintiff, thinking he had reached the station, arose from his seat, and attempted to get off, just as the train was beginning to move slowly forward, and he was injured. It was held that he was entitled to recover. *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 32, 21 Am. & Eng. R. Cas. 374, 51 Am. Rep. 598. The name of the station which was plaintiff's destination was announced while the train was in motion, and soon thereafter it was brought to a full stop, some distance from the station. The plaintiff went out on the platform of the car for the purpose of alighting, and while standing thereon the train was suddenly put in motion towards the depot, whereby she was thrown off and injured. This was at night. It is said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to

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stop the train short of such station, in the nighttime. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night, this must be the inevitable result." *Central R. Co. v. Van Horn*, 38 N. J. L. 133. In *Taber v. D., L. & W. R. Co.*, 71 N. Y. 489, plaintiff was a passenger on defendant's train; she had a ticket for W.; she was not familiar with that station, but knew it was the next station to C. F., and about three-fourths of a mile therefrom. The night was dark. There was no depot at W., or station light, or anything to indicate the stopping place to a person not familiar with it. She knew when the train passed C. F., and as her evidence tended to show, after the proper interval, so as to run the distance to W., the train came to a full stop; it had in fact run by the station. Before reaching it the brakeman announced the station; several passengers arose to leave; plaintiff then rose from her seat near the center of the car, walked out upon the platform, took hold of the rail, stepped down one step and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. In an action to recover damages, it was held that it was a question for the jury whether, in the exercise of reasonable care and prudence, defendant should not have given notice to passengers desiring to alight at the station, that the train had not come to a final stop but would back up, and that the plaintiff was justified under the circumstances in supposing she had reached her destination and in attempting to leave the car; at least that the question of contributory negligence on her part was proper for the jury. The railroad company's servants announced that the next stop of the train on which the plaintiff's wife was riding would be at her station. The train ran on a side track ten miles out from such station, in the nighttime, to permit a freight train to pass, when the plaintiff's wife, supposing she had arrived at her own station, no announcement having been made of the name of the station where the train was then stopping, alighted with the assistance of a brakeman, who did not inquire where she was going, and was left alone in the dark. The side track was not a regular stopping place for the train. It was held that the company was liable for the damages which she sustained. *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. Cas. 436. In a case in which the evidence for plaintiff tended to prove that, as the train upon which plaintiff was a passenger approached her station, at about nine o'clock in the evening, the whistle was sounded and the train stopped; that the brakeman came into the car, of which she was the only occupant, and said to her, "I will help you out with your things now"; that she arose, with a valise and some packages in her hands, and followed the brakeman, who opened the door and held it back while she passed out to the front platform, and who crossed over the coupling to the baggage car; that, while he was there standing with his side toward her looking toward the engine, she started down the steps, and, as she reached the third step, the train, which had remained stationary about fifteen seconds, suddenly started with a jerk, throwing her off and injuring her; it was held that the question of defendant's negligence was properly submitted to the jury. *Smithson v. Southern Pac. Co.* (Ore. 1900), 60 Pac. 907. In an English case, plaintiff, a woman, took passage on a train from St. Mary Cray to Bromley. As the train approached Bromley the name of the station was called out, and shortly afterward the train stopped, but not until it had carried the plaintiff's car beyond the platform. The plaintiff got up from her seat and started to descend from the car where it was. Just as she was stepping from the train, it was backed suddenly for the purpose of bringing all the cars abreast of the platform, and the plaintiff fell and was injured. It was held that she was not entitled to recover. Mr. Justice Blackburn said: "It appears that the train was coming up to the station, and some official on the platform called out 'Brom-

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ley—Bromley!’ Calling the name of the station, I understand, and have always understood, to mean this, that it is an intimation to all who are traveling by the train that the station at which the train is about to stop is that particular station. Calling out the name of the station is not an invitation to alight.” *Lewis v. London, etc., R. Co.*, L. R. 9 Q. B. 66, 43 L. J. Q. B. 8, 29 L. T. N. S. 397, 22 W. R. 153, 7 Moak’s Eng. 119. But this case has, it seems, been virtually overruled by the house of lords in *Bridges v. North London R. Co.*, L. R. 7 H. L. 213, 9 Moak’s Eng. 165, the facts of which have been stated above. See ante, XV, D, 2. See *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 32, 21 Am. & Eng. R. Cas. 374, 51 Am. Rep. 598. The case is also in conflict with *Weller v. London, etc., R. Co.*, L. R. 9 C. P. 126, 8 Moak’s Eng. 441, which will be found set forth above. See ante, XV, D, 2.

E. ANNOUNCING STATION AND STOPPING, AS REQUIRED BY LAW, AT CROSSING.

In some of the cases in which it appeared that the name of the station had been announced and the train subsequently stopped at a crossing in compliance with a statutory requirement, some importance seems to have been attached to the fact that the carrier was, by law, required to stop the train at the crossing. Where the next station was announced just as the train was leaving one station, and the train, on reaching a place where another railroad crossed the track, came to a stop in compliance with a statutory requirement to do so, plaintiff, supposing that her station had been reached, attempted to alight and was injured by the starting of the train. A judgment for defendant was sustained, the court saying that a railroad company is under no obligation to guard against an exodus of passengers at an intervening railroad crossing, merely because it has given the name of the next station after its last preceding stop; it has a right to expect that passengers will remain in the cars until stations are called, as is the common custom on railroads, or, if they do not, that they will inform themselves of their whereabouts. *Ninock v. Detroit, etc., R. Co.*, 97 Mich. 425, 56 N. W. 780. Plaintiff intended to take another train at the crossing of two railways. Before arriving at the junction, the name of the station was called out, and the train came to a full stop, as required by law, on reaching a crossing. Plaintiff hurried to leave the car, went down the steps where there was no platform or other convenience for landing, and as she was stepping off the cars were suddenly started to go forward to the depot, when she fell and was injured. This was in daylight, and it does not appear that any person employed on the train observed her. It was held that the injury was purely accidental, unless plaintiff was herself negligent, and that the company was not liable. *Campbell, J.*, said: “The only cause of the mischief, leaving defendant’s carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was at the proper place, a short distance further on, a building and platform, appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and, from the distances mentioned, we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this.” *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566, 18 Am. & Eng. R. Cas. 176. But if to the announcement of a station and the stopping of the train at a crossing, as required by law, are added other acts which amount to an invitation to passengers to alight, and the surrounding circumstances are such that the passengers, though in the exercise of due care, cannot know, and they are not informed by the carrier’s serv-

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ants, that the station has not been reached, a jury may properly find the carrier guilty of negligence. In a case in which the evidence justified the jury in finding that, after plaintiff's station had been called, the train stopped, as required by statute, at a railroad crossing, and the car doors were thrown open and so left; that, although it was daylight so that there was practically no difficulty in seeing when a person was once outside and clear of the car, it was snowing and the wind blowing at the time, and the car windows were so obscured thereby that passengers could not look out and learn when the platform and station were reached; that plaintiff, supposing that the station had been reached went out on the platform of the car and on the steps on the side opposite to the station platform, and the steps of the car being slippery by reason of the snow and ice, instead of looking out looked down so as not to step on the slippery places; that just as she was placing her feet on the second step the train was started, although without disturbing her equilibrium; that she then noticed that there was no platform or station, thought that the train had pulled by them, became frightened and dizzy and was falling, when she jumped or threw herself from the steps, clear of the car, so that she would not fall under it, and was seriously injured; it was held that the question of defendant's negligence was properly submitted to the jury. *Larson v. Minneapolis, etc., R. Co.* (Minn. 1902), 88 N. W. 994.

NILES TOOL WORKS CO. v. LOUISVILLE, N. A. & C. RY. CO.

(*Circuit Court of Appeals, Seventh Circuit, January 7, 1902.*)

[112 Fed. Rep. 561.]

Railroads—Foreclosure of Mortgage—Preferential Debts.*

A claim for the price of machinery sold to a mortgagor railroad company, and used by it in the construction of shops owned by a second company, under a contract by which the mortgagor secured their use by lease and also the stock of the second company, is not entitled to priority of payment over the mortgage debt in a foreclosure suit as a preferential claim, where there was no surplus of income from the receivership, no diversion of current income was shown, and the shops so built never passed under the mortgage, and were not included in the foreclosure decree or sale.

Appeal from the Circuit Court of the United States for the District of Indiana.

The appellant, the Niles Tool Works Company, filed an intervening petition in the consolidated foreclosure action of the Farmers' Loan & Trust Company and John H. Barker against the Louisville, New Albany & Chicago Railway Company (for brevity called the New Albany Company) et al., for an indebtedness contracted by the last-named company, and claimed by the intervener to be a preferred claim. On the hearing of the report thereon of a special master and of the exceptions thereto, the circuit court confirmed the report in so far as it recommended that the intervener recover the sum of \$3,309.67, with interest, but disapproved the same in respect of its allowance as a preferential claim, and decreed accordingly that the claim be allowed "as a general claim, without preference, *pari passu* with all other claims not

*See generally, 20 Am. & Eng. Enc. Law 417 et seq.

entitled to preference." This appeal is from the denial of the claim as preferred. The claim is for three boilers furnished by the appellant to the New Albany Company, under contract in writing, the last delivery upon the contract being made January 15, 1896, but the master finds that they were not erected in accordance with the contract until March 7, 1896; and the boilers were purchased and used by the New Albany Company in the construction of shops at La Fayette, Ind., under an arrangement with the La Fayette & Monon Railway Company (hereinafter called the La Fayette Company), and under the following circumstances: The La Fayette Company received a subsidy from the township to aid in the construction of its proposed short line of railroad and shops at La Fayette, and, having purchased right of way and ground for the location of shops out of such subsidy, entered into contract with the New Albany Company whereby the latter company agreed to furnish and construct the road, tracks, and car shops, and accept in full payment therefor the remainder of the subsidy and the entire capital stock of the La Fayette Company, and such contract was performed by both parties. The capital stock of the La Fayette Company so received by the New Albany Company was hypothecated by the latter company to secure a loan, and the title subsequently passed thereunder, so that no interest in such stock came to the mortgagee or entered into the foreclosure proceeding in controversy. Pursuant to the arrangement thus made, the New Albany Company entered into possession and use of the shops at La Fayette, with the title remaining in the La Fayette Company, except as to a tract of three acres, and abandoned its shops theretofore held at New Albany, from which machinery was removed to the La Fayette shops, but no part of this La Fayette property was included in the mortgage foreclosure or sale. The original action against the New Albany Company was a creditors' bill, under which the receiver was appointed August 24, 1896. On November 12, 1896, bills were filed to foreclose several mortgages against the New Albany Company, which were consolidated under the present title, the receivership was extended accordingly, and final decree of foreclosure was entered therein January 23, 1897, which provided, among other matters, that the purchaser at the sale should pay all receiver's indebtedness and claims which should be allowed by the court as "prior in lien to the mortgages foreclosed." The sale was made March 10, 1897, and the purchasers organized the Chicago, Indianapolis & Louisville Railway Company, and entered into possession of the property thus acquired. The intervener's petition was filed May 3, 1897.

F. F. Moore, for appellant.

G. W. Kretzinger, for appellee.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

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SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

The appellant is an unsecured creditor of the New Albany Company, and the sole question involved in this appeal is whether its claim is entitled to priority over the interest of the mortgagees which was acquired by the purchasers under the foreclosure decree and sale. The indebtedness was in no sense incurred by the receiver, and there is no showing or claim of surplus income derived during the receivership; and while it is contended on behalf of the appellant that unincumbered assets of the New Albany Company are within the custody of the court, which should be administered for the benefit of the claim if priority is not allowable, such contention is neither sustainable under the facts of record nor raised by the assignment of errors. Aside, therefore, from the secondary question whether the indebtedness was incurred within the period of six months preceding the receivership in the case, the claim for the purchase price of the boilers which are furnished to the mortgagor company cannot be allowed priority, and thus displace the mortgage liens, unless the contract of purchase and its subject-matter come within the limited class of expenditures for which such allowance is authorized. The boilers so furnished by the appellant entered into the construction by the New Albany Company of car shops for the La Fayette Company, at La Fayette, Ind., under an arrangement for earning certain municipal aid which was offered the latter company, with ownership of the property held in the name of the La Fayette Company, but its use by the New Albany Company was secured through a long-term lease. Under the contract for the erection of the shops and other work the La Fayette Company transferred to the New Albany Company the amount received as municipal aid, less the portion thereof used in the purchase of real estate required for the purpose, together with the entire capital stock of the La Fayette Company, and the New Albany Company then borrowed the sum of \$100,000, and pledged this stock as collateral security for the loan. The record does not show that earnings of the New Albany Company were either used or promised in carrying out this arrangement, but it does show that neither the proceeds of the contract nor the ownership of the shops came to the mortgagees of that company, that the La Fayette property was not included in the foreclosure decree or sale, and that any title thereto which may have been acquired by the new company is derived from other sources. Performance of this contract cannot be classified as an operating expense of the New Albany railroad, and the alleged fact that a portion of the machinery which entered into the construction of the new shops came from the abandoned New Albany shops does not establish a case of railroad repairs.

On the facts thus appearing we are of opinion that no foundation exists for priority of the appellant's claim to make

it chargeable against the purchasers under the foreclosure decree, and that the order of the circuit court thereupon is sustained by the entire line of authorities. Reversal is sought on the authority of expressions in the early case of *Fosdick v. Schall*, 99 U. S. 235, 252, 25 L. Ed. 339, upon which, as remarked in the brief on its behalf, the "appellant anchors its faith"; but the contention ignores the distinctions which are there pointed out as grounds for the preference, and is untenable as well under that decision as it clearly is under the uniform line of later authorities. In *Fosdick v. Schall* the doctrine is recognized, as fully exemplified in the later cases, that the mortgagee of a railroad company is entitled to the net income only to be applied in payment of interest or principal of the mortgage indebtedness; that there is an implied agreement that the current income shall be first applied to payment of the necessary operating expenses of the road, and an equitable lien thus arises in favor of debts for current expenses, which will be enforced to displace mortgage liens within reasonable limitations; and, as remarked in *International Trust Co. v. T. B. Townsend Brick & Contracting Co.*, 37 C. C. A. 396, 405, 95 Fed. 850, 859, "the doctrine thus stated is the foundation of the 'diversion' or 'restoration' doctrine applied in the later cases." So the rule which was actually applied in *Fosdick v. Schall* was in conformity with such doctrine, and, while it is true that remarks in the opinion indicate that "proper equipment and useful improvements" may be chargeable against the gross earnings, the ground for such possible exception is thus stated:

"If, for the convenience of the moment, something is taken from what may not improperly be called the 'current debt fund,' and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees." 99 U. S. 252, 25 L. Ed. 342.

This suggestion of contingencies which may enlarge the exception in favor of preferences, if consistent with the latter decisions, does not support the appellant's claim, for the reason that neither of the conditions so indicated appears in the present record. Since that opinion, however, the rule has become firmly established that indebtedness contracted by the mortgagor for improvements which are work of original construction, and not mere repairs, cannot displace the mortgage liens, though the mortgaged property is thereby improved. *Porter v. Steel Co.*, 120 U. S. 649, 671, 7 Sup. Ct. 741, 30 L. Ed. 830; *Wood v. Safe Deposit Co.*, 128 U. S. 416, 421, 9 Sup. Ct. 131, 32 L. Ed. 472; *Railroad Co. v. Hamilton*, 134 U. S. 296, 301, 10 Sup. Ct. 546, 33 L. Ed. 905; *Thomas v.*

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Car Co., 149 U. S. 95, 111, 13 Sup. Ct. 824, 37 L. Ed. 663. Moreover, the recent cases of Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, and Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475, in which the authorities are reviewed, have settled the doctrine that preference cannot be allowed, unless "the debt was one fairly to be regarded as part of the operating expenses of the railroad, incurred in the ordinary course of business, and to be met out of the current receipts." Applying either rule to the claim in controversy, the preference was rightly denied, and the decree accordingly is affirmed.

MCCABE'S ADM'X v. MAYSVILLE & B. S. R. Co. et al.

(Court of Appeals of Kentucky, March 5, 1902.)

[66 S. W. Rep. 1054.]

Lease of Railroad—Authority of Railroad Corporations.

As statutes are not presumed to be intended to have effect beyond the jurisdiction of the state, Act Jan. 22, 1858 (2 Stant. Rev. St. p. 548), authorizing "railroad companies in this commonwealth" to contract "for the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line," applies only to domestic corporations, as the statute provides how the meeting of stockholders to approve such contracts shall be called, and it cannot be presumed that such a provision was intended to regulate the proceedings of corporations in other states.

Same—Same.

A provision of the charter of a railroad company "that whenever any portion of said railroad shall be completed and in readiness for business, such portion thereof may be put in operation under authority of the board of directors on such terms for the use thereof as the board of directors may prescribe," not exceeding certain maximum rates, with a proviso that "they may make special contracts for special services on such terms and conditions as the parties thereto may agree upon," did not authorize the corporation to lease its road, as such charters are to be strictly construed.

Same—Same—Liability for Negligence of Lessee.*

A provision in the charter of a railroad corporation empowering the corporation to "make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any other part thereof," empowered the corporation to lease its road, but not so as to relieve it from liability for the negligence of the lessee in the operation of a train whereby a person on the track was struck and killed.

O'Rear and Du Relle, JJ., dissenting.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by Peter McCabe's administratrix against the Maysville & Big Sandy Railroad Company and the Chesapeake &

*As to the liability of a lessor railroad for the negligence of its lessee, see Perry v. Western North Carolina R. Co. (N. Car.), 21 Am. & Eng. R. Cas., N. S., 659, and foot-note.

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Ohio Railway Company, to recover damages for the death of plaintiff's intestate. Judgment removing cause to United States circuit court, and plaintiff appeals. Reversed.

A. E. Cole & Son, for appellant.

W. H. Wadsworth, for appellees.

HOBSON, J. Appellant, Emma R. McCabe, as administratrix of Peter McCabe, deceased, filed this suit in the Mason circuit court against appellees, the Maysville & Big Sandy Railroad Company and the Chesapeake & Ohio Railway Company, to recover damages for the death of her intestate, who, she alleged, was killed in September, 1901, while walking along Third street in the city of Maysville, by an engine and train of the Chesapeake & Ohio Railway Company, by reason of the negligence of its agents in charge thereof, as well as the negligence of the Maysville & Big Sandy Railroad Company in permitting it to use the track, which was the property of the latter company. She alleged that after the building and completion of its road, and more than 12 months before the injuries to her intestate, the Maysville & Big Sandy Railroad Company leased and transferred its entire line of road to the Chesapeake & Ohio Railway Company, and that the latter has since that time been in the exclusive possession and control of it; that by the laws of Kentucky the lease and transfer were ultra vires and void; that in December, 1893, pursuant to section 211 of the constitution of Kentucky, and section 841, Ky. St., the Chesapeake & Ohio Railway Company became a corporation, citizen, and resident of this state by filing in the office of the secretary of state, and in the office of the railroad commission, copies of its articles of incorporation, and that thereupon a certificate of said incorporation was issued to it by the secretary of state. She further alleged that the railroad track was laid in Third street under an ordinance from the city authorities; that the railroad track took up the whole street, so as to render it unfit for travel by wagons or vehicles; that the city authorities were without power to authorize such a use of the street; and that the ordinance was void, and the operation of the trains on it was illegal. She prayed judgment for \$25,000. The Chesapeake & Ohio Railway Company filed its petition to remove the case to the circuit court of the United States, alleging that it is a corporation created under the laws of the state of Virginia, and a citizen of that state, and of no other; that the Maysville & Big Sandy Railroad Company is not a proper party to the action, and was made a party to it for the sole purpose of preventing a removal of the case to the United States court; that no cause of action is shown in the petition against the Maysville & Big Sandy Railroad Company; that it had authority of law to make the lease referred to, and is insolvent. It is specially pleaded in the petition that, by virtue of the charter and amendments thereto of the Mays-

ville & Big Sandy Railroad Company, and particularly of the act of February 17, 1866, entitled "An act authorizing the sale of the Maysville & Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road" (Acts 1865-66, p. 664), and of the general laws of the state of Kentucky, that company had full power and authority to make the lease referred to. In this petition the court, over the plaintiff's objection, ordered the case to be removed to the federal court, and the plaintiff prosecutes this appeal.

In *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, the United States supreme court said: "A petition for removal, when presented to the state court, becomes part of the record of that court, and must, doubtless, show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and, if it does, the circuit court of the United States cannot allow an amendment of the petition, but must remand the case." It was the duty, therefore, of the court below, when the petition for removal was presented, to determine whether the jurisdictional facts upon which the right of removal depended appeared in the petition, and, if they did not appear, to overrule the motion for the removal of the case. On appeal from that judgment the same duty devolves upon this court. Under the act of congress the jurisdictional facts to sustain removal are that "there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them." It has been held that in a suit against two defendants jointly liable, where one of them is a citizen of the state and the other a citizen of another state, if they are properly sued jointly, a removal cannot be had by the nonresident defendant. *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. The common-law distinctions between the different forms of action have been abolished by our Code of Practice, and all persons who are liable for a wrong may now be sued jointly in this state in an action to recover for negligence. A railroad company is given by the state certain franchises, and thereby assumes certain burdens. These it cannot transfer to another without legislative authority, so as to exempt itself from responsibility for the torts of its transferee. The Maysville & Big Sandy Railroad Company was therefore liable to appellant jointly with the Chesapeake & Ohio Railway Company, if the transfer was unauthorized, and, in this event, the suit against the two companies jointly might be properly maintained. To hold otherwise would be to require the plaintiff to prosecute two actions, although each of the defendants was alike liable to him. The question then to be determined is, did the petition for removal show that the controversy was

wholly between the plaintiff and the Chesapeake & Ohio Railway company, and that the Maysville & Big Sandy Railroad Company was not a proper party to the action? Section 203 of the state constitution is in these words: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges." The franchises of a corporation are its property. The declaration that these in case of a lease or alienation shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability; for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of its lessee. If the lease in question was made after the adoption of the constitution, it would not exempt the lessor from liability. The date of the lease is not shown in the record, but if it was made before the adoption of the constitution the result is the same. An act of the general assembly approved January 22, 1858, entitled "An act to authorize railroad companies to make certain contracts with each other," is relied on. But this act only refers to "railroad companies in this commonwealth," or domestic corporations. The act is in these words (see 2 Stant. Rev. St. p. 548): "That all railroad companies in this commonwealth shall have power and authority to make, with each other, contracts of the following character: 1. For the consolidation of either the management, profits, or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road, either temporarily or permanently. 2. For the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line. 3. For the completion in whole or in part, of the unfinished road of any company. 4. For giving a common name and style to any continuous road belonging to two or more companies: provided, however, that all such contracts shall be approved by a majority, in interest, of all the stockholders in each of the contracting companies, at some stated or called meeting of the same." Section 2: "That the called meetings of stockholders, provided for in the first section, shall be called by the president and directors of the company, and notice of the time and place thereof, and of the purposes of such meeting, shall be advertised in one or more newspapers of general circulation in the county where the principal office of such company is then kept, for at least two weeks before such meeting." In the construction of statutes it is a cardinal rule that they are not presumed to be intended to have effect beyond the jurisdiction of the state. The second section of

the act can, therefore, have no reasonable application to foreign companies, for it cannot be presumed that the legislature intended to regulate the proceedings of the president, directors, or stockholders of such companies or advertisements to be given in other states. Taking this section in connection with the opening words of the first section, "All railroad companies in this commonwealth," we see no room for doubt that the legislature intended to confer these privileges only on domestic companies.

As to the power of the Maysville & Big Sandy Railroad Company to make the lease, we are also referred to the following provision in its charter (Act Nov. 25, 1851, § 8): "Sec. 8. That whenever any portion of said railroad shall be completed and in readiness for business, such portion thereof may be put in operation under authority of the board of directors on such terms for the use thereof as the board of directors may prescribe, not exceeding the maximum rates authorized by the fifteenth section of the act incorporating the Maysville & Lexington Railroad Company: provided, they may make special contracts for special services on such terms and conditions as the parties thereto may agree upon." Acts 1851-52, p. 390. We do not see that this section goes further than to authorize the operation of the road under authority of the board of directors. The rule is that charters of this sort are strictly construed. We are also referred to the following provision (Act Feb. 17, 1866, § 3; see Acts 1865-66, p. 664): "The purchaser or purchasers at any such sale after the same has been ratified and approved by said court shall in virtue thereof be invested with the title to said road and all its franchises and chartered privileges as fully and completely as if the same had been originally granted to them. They shall have power to reorganize the company under its charter; and for the purpose of its charter open books and receive and collect subscriptions of stock to said company, make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof." When this statute was passed the road was not completed; the purpose of the provision was to enable the company to complete and operate the road. To this end it was empowered to "make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof." Thus power was granted it to make the contract with the Chesapeake & Ohio Railway Company above referred to; but no exemption was granted from any liabilities which attached to it, and such an exemption, as against the public, cannot be implied. While there is some conflict of authority, we think the great weight supports this conclusion. In *Harmon v. Railroad Co.*, 28 S. C. 404, 5 S. E. 835, 13 Am. St. Rep. 686, the court said: "The circuit judge seems to rest his conclusion upon the ground that, inasmuch as under the charter

of the defendant company it has power to lease its road, it follows necessarily that when the road is leased the company is released from all its obligations to the public and to individuals, and these obligations then rest solely upon the lessee. We cannot accept this view. It rests upon the idea that, inasmuch as the defendant company incurs these obligations in exchange, as it were, for the chartered rights and privileges conferred by the legislature, when such rights and privileges are transferred to another by the consent of the legislature, the corresponding obligations are likewise transferred to such other person or corporation. This, at first view, seems plausible, and is the view adopted in some of the states. But it rests upon the unfounded assumption that the defendant company has transferred all of its chartered rights and privileges to the Richmond & Danville Railroad Company. We understand the testimony as tending to show, and the concession of counsel to be, simply, that the defendant company has leased its road to the Richmond & Danville Railroad Company, and not that it had transferred all its chartered rights and privileges to that company. On the contrary, this very case necessarily implies that the defendant still maintains its corporate organization and existence, and instead of running its road itself directly has bargained with another company to run it for a compensation, as we must suppose. The defendant company, therefore, in reality still enjoys the benefits of its charter, and cannot be permitted to escape its corresponding obligations." In *Driscoll v. Railroad Co.*, 65 Conn. 254, 32 Atl. 354, the court said: "A grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the powers of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise. Such grants are never made except at the request of the corporation. In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises except by an act of the legislature to that effect so distinct and unequivocal as not to be open to mistake. Nothing should be left to inference." In *Braslin v. Railroad Co.*, 145 Mass. 68, 13 N. E. 65, the court said: "The sanction of the legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. * * * It was under a positive duty and obligation to the public, and the consent of the legislature to the making of the lease did not imply a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it

by the legislature, clear evidence of a legislative assent to such exoneration should be found." In *Logan v. Railroad Co.*, 116 N. C. 946, 21 S. E. 959, the court said: "After conferring upon a corporation the right of eminent domain, with many other special privileges which the legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the state cannot be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs or defaults." These were all suits against the lessor where the lease was authorized by statute. See, to the same effect, *Balsley v. Railroad Co.*, 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; *Singleton v. Southwestern R. R.*, 70 Ga. 464, 48 Am. Rep. 574; *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111; *Railroad Co. v. Morris*, 68 Tex. 59, 3 S. W. 457; *Chollett v. Railroad Co.*, 26 Neb. 169, 41 N. W. 1106, 4 L. R. A. 135; *Parr v. Railroad Co.*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Stephens v. Railroad Co.*, 36 Iowa, 327; *Bower v. Railroad Co.*, 42 Iowa, 546; *Railroad Co. v. Lee*, 71 Tex. 558, 9 S. W. 604.

In some states a distinction is made between injuries resulting from the negligence of the lessee alone and those resulting from the failure of the lessor to discharge some duty imposed by law upon him, where the lease is authorized by statute, and the lessor is only held liable for the latter. Thus the lessor is held responsible where cattle stray upon the track and are injured while the road is operated by the lessee by reason of the failure to fence the track as required by statute, or where a person is injured by reason of the improper construction of a station house too near the track, or an injury results from a failure to put in sufficient cattle guards, or there is a failure to transport persons or property as required by the charter of the lessor. *Heron v. Railway Co.*, 68 Minn. 542, 71 N. W. 706; *Lee v. Railroad Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140; *Bean v. Railroad Co.*, 63 Me. 295; *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Lakin v. Railroad Co.*, 13 Or. 436, 11 Pac. 68, 57 Am. St. Rep. 25. After citing a number of these cases in his note to *Lee v. Railroad Co.* (Cal.) 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 152, Freeman, commenting on them, says: "If it be true, as the decisions with substantial unanimity admit, that a lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except perhaps where the plaintiff is

suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of a railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its track and station houses in safe condition? In truth we do not know of any duties of a railway corporation which are of a private character. * * * There are cases in which the lessor had been held not responsible for injuries to the servants of the lessee by reason of the lessee's negligence. *Railroad Co. v. Washington*, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344; *Hukill v. Railroad Co.* (C. C.) 72 Fed. 745. These cases rest on the idea that the duty owed to the servant by his employer grows out of the contract of service, which is voluntarily entered into by the servant, and that he does not stand to it like the public. In addition to these there is a line of cases holding the lessor not responsible for any acts of the lessee, on the ground that the legislative authority to lease constitutes the lessee quoad hoc the owner of the property, and substitutes him for the lessor. *Miller v. Railroad Co.*, 125 N. Y. 118, 26 N. E. 35; *Caruthers v. Railroad Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737, and cases cited.

Upon principle and the weight of authority we are of opinion that the Maysville & Big Sandy Railroad Company is liable to appellant. The obligation to fence the track for the protection of stock, or to receive passengers or freight, or carry them safely, is no more a duty of the lessor imposed upon it by its charter than its duty to avoid injury to the traveling public in the discharge of its functions, as in this case. By its acceptance of the franchises conferred by the state the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents. For such grants are strictly construed, and, as against the public, are never extended by construction. In the case before us there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit. In *Harper v. Railroad Co.*, 90 Ky. 359, 14 S. W. 346, the question was not elaborated, and it is apparent from the opinion that only the question of jurisdiction was really considered by the court; for it does not appear

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from the facts stated that the lease in that case was authorized by statute, or under what provision of law it was made.

It is unnecessary for us to pass upon section 211 of the constitution and section 841 of the Kentucky Statutes, and determine whether appellee can accept citizenship in this state, and so take all its advantages and at the same time plead that it is a nonresident of the state.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

O'REAR and DU RELLE, JJ., dissent. BURNAM, J., not sitting.

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(Appellate Court of Indiana, Division No. 1, Jan. 8, 1902.)

[62 N. E. Rep. 455.]

Liability for Accident at Crossing as Affected by Failure to Maintain Bells Not Required by Law.*

Where a railroad company, without any legal duty resting on it to do so, established and maintained bells at a highway crossing to warn travelers of approaching trains, and decedent knew of the bells, he had a right to presume that the way was clear when the bells were not rung; but such presumption is to be considered only as a circumstance in determining whether he exercised the degree of care required.

Same—Contributory Negligence.

A traveler on a highway who attempted to cross three parallel railroad tracks, on the first of which were cars which obstructed a view of the others, without stopping to look and listen after passing these cars, relying solely on the absence of warning bells, which were usually rung, and who was struck by a train on the third track which could have been seen and heard if he had looked and listened, will be deemed guilty of contributory negligence, as a matter of law.

Unsupported Findings.

A finding in a general verdict that decedent looked and listened for approaching trains before passing on the track will be deemed unsupported by the evidence, where the special verdict contained a finding that there was no evidence that decedent looked and listened after passing the obstructions on the first track.

Appeal from circuit court, Boone county; B. S. Higgins, Judge.

Action by Hubert E. Heine, administrator, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

John T. Dye and L. J. Hackney, for appellant.

Jameson & Joss, A. J. Shelby, J. G. Adams, and Esterbrook & Hines, for appellee.

ROBINSON, P. J. Suit by appellee for damages for the death of his decedent. Amended complaint in 10 paragraphs, to each of which a demurrer was overruled, except the fourth and eighth paragraphs, to which demurrers were

*See 3 Rap. & Mack's Dig. 494 et seq.

sustained. Verdict in appellee's favor; also answers to interrogatories. Appellant's motion for judgment non obstante overruled, and judgment on the verdict.

The following facts were found by the jury in answer to interrogatories: Appellant had three tracks at the Newman street crossing. Decedent approached the tracks from the south, and went upon the right of way near the center of the street, and over the most southerly track, riding a bicycle. There were cars standing upon the most southerly track, so that a person approaching from the south could not see a locomotive approaching on the main tracks from either direction, and on the west side these cars extended two-thirds of the way over the sidewalk. The distance between the north rail of the most southerly track and the south rail of the most northerly track is 26.2 feet; from the north rail of the most southerly and the south rail of the track next north of it is 12.9 feet; from the center of the most southerly track to the center of the track next north is 17.6 feet; and from the center of the middle track to the center of the most northerly track, 13.3 feet. The three tracks were parallel, and the most northerly track and the one south of it extended from Newman street westward, 2,290 feet or more. Decedent was killed at 6:20 p. m. May 26th by being struck by a locomotive from the west on the most northerly track. The locomotive was running backwards. No bell was ringing, and no watchman was on the rear end. There were city ordinances in force prohibiting a greater speed than four miles an hour, also the running backward of a locomotive without a watchman on the rear end, and also running a locomotive in the city without ringing the bell while the same was moving. Appellant had established and operated for more than a year previously a system of warning bells at this street crossing to warn travelers of approaching trains, but during that entire day they were out of order and not ringing, and did not ring as the locomotive approached the crossing. Decedent dismounted from his bicycle before he reached the place where he was struck, and at the time he was killed was in full possession of all his faculties, and as he approached Newman street he used his senses of sight and hearing, and acted as an ordinarily prudent man would under the circumstances and conditions surrounding him at the time. Before he went upon the tracks at Newman street he used his senses of sight and hearing, and did not see or hear anything that warned him of the approaching locomotive. His view along the main track was obstructed by the cars on the south track until he had crossed the track. He knew of the system of warning bells, and relied on the fact that they were not ringing, in attempting to cross the track. Decedent, while exercising his senses of sight and hearing as an ordinarily prudent man would under the circumstances in which he was placed, was induced to enter upon the tracks by reason of the warning bells not sound-

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ing. "Was said Trayford, while acting upon such inducement, suddenly and unexpectedly confronted by an approaching locomotive of the defendant running backward at a speed of thirty miles an hour, and did said Trayford, when thus confronted by what he believed to be sudden and impending peril, use his sense of sight and hearing, and act as an ordinarily prudent man would have done under the circumstances surrounding him? Ans. Sense and hearing, yes. Speed of engine not so fast." "On the 26th day of May, 1897, at the time of the collision of defendant's locomotive with Trayford, could not one crossing the tracks of defendant at Newman street from the south, and after passing the most southerly of the tracks, and becoming free from obstructions upon it, see to the westward, free from obstruction, an approaching locomotive at any point west of Newman street, within a distance of more than twenty-two hundred feet, before he would need to go upon the middle track or north track of the defendant at said crossing? Ans. Yes." "If Trayford crossed the defendant's track from the south side thereof, and if his view was obstructed by cars upon the most southerly track while he was crossing the same, could he not, after passing such obstruction, have looked to the westward, and seen the defendant's locomotive approaching, before he went upon the track upon which he was struck, in time to have avoided the collision? Ans. Yes; had he not depended on the warning bells." "If you answer the last interrogatory in the negative, state what obstruction or circumstance prevented his looking to the westward and seeing the approaching locomotive after passing the obstruction upon the first track, and before going upon the track upon which he was struck. Ans. He depended on the warning bells." "Did Trayford, after crossing the most southerly of defendant's tracks, if he did cross the same, look or listen toward the west from Newman street to see or hear the approach of a locomotive or train? Ans. No evidence." "If you answer the last interrogatory in the affirmative, state at what distance from the north line of the south track he was looking and listening. Ans. No evidence."

The averments of the complaint that appellant was negligent, and that appellee's decedent was free from any fault contributing to his injury, are found by the general verdict in appellee's favor to be true. There is nothing in the answers to the interrogatories that conflicts with the finding of the general verdict that appellant was negligent. But it is insisted by counsel for appellant that the facts disclosed by the answers require the court to rule, as a matter of law, that decedent was guilty of contributory negligence. The jury found that appellant had established and operated for more than a year previous to the time in question a system of warning bells at this crossing to warn travelers of approaching trains. No legal duty rested upon appellant to establish and maintain such bells, but as it in fact had done so, and decedent knew

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of the bells, he had the right to presume they would ring if a train or locomotive was approaching the crossing; and, if they did not ring, he could presume that the way was clear. *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136. Although the signal bells were maintained for the purpose of warning travelers, which fact decedent knew, and although decedent had the right to presume that no train or locomotive was approaching, because the signal bells were not ringing, yet this did not excuse him from the use of his senses of sight and hearing to ascertain for himself whether a train or locomotive was in fact approaching. The failure to give the signals raised the presumption of safety, but such failure was no more than a circumstance which could properly be taken into consideration in determining the ultimate question of whether he did exercise the degree of care required or not. And, in determining whether he did exercise such care, his conduct at the time is to be judged in the light of such presumption. *Railway Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136; *Railway Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; *Railroad Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128. So that, although there was a failure to give the signals, he was still required to look for an approaching locomotive if by looking he could have seen it, and he was required to listen for an approaching locomotive if by listening he could have heard it, and his failure to do so was negligence. And when the jury say that after he had passed the obstruction upon the most southerly track, and before he went upon the track upon which he was struck, he could have looked to the westward and have seen the locomotive approaching in time to have avoided the collision, had he not depended on the warning bells, they are not excusing the omission of the duty resting upon decedent to look for a train or locomotive before going upon the track. The duty to look still rested upon him, notwithstanding the signals were not given, and if he had looked he could have seen the locomotive in time to have avoided the collision. It is true, the jury find by the general verdict that decedent looked and listened for approaching trains or locomotives before passing upon the track where he was killed, but, when they say there is no evidence that after crossing the most southerly track he looked or listened toward the west from Newman street to see or hear the approach of a locomotive or train, they are admitting that their finding in the general verdict that he did look and listen has no evidence to sustain it. The facts in the case at bar are very similar to those in the case of *Railroad Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040. The conclusion reached in that case is controlling here, and necessarily requires a reversal of the judgment in this case.

Judgment reversed, with instructions to sustain appellant's motion for judgment on answers to interrogatories.

GULF, C. & S. F. RY. CO. v. BRYANT *et al.**(Court of Civil Appeals of Texas, Feb. 5, 1902.)*

[66 S. W. Rep. 804.]

Liability for Injury to Licensee on Track from Its Negligent Construction.*

A railway company is liable for injuries sustained by persons lawfully on its tracks by reason of negligence in the construction of its tracks.

Appeal—Review.

A verdict of a jury on conflicting evidence will not be reviewed on appeal.

Liability for Negligence of Persons Permitted to Move Cars on Side Track.

A railway company cannot, by permitting persons other than its own servants to move cars on a side track, or by consenting thereto, escape liability to a person injured through the negligence of such persons.

Same—Negligence, and Erroneous Conduct Induced by Fear.

Where a person was injured while attempting to jump from a car standing on a side track which he was unloading, because of fear of injury by remaining in the car, caused by a belief that his car would be struck by another car coming down the side track, which was on a down grade, the defendant railway company is not relieved from liability by showing that when he jumped there was no necessity for his doing so, and that he would not have been injured had he remained in the car, as none of the passing cars struck it.

Evidence.

Where, in an action for personal injuries sustained while loading a car standing on a side track of defendant, the evidence showed that the person was loading the right car, it became immaterial whether any of defendant's servants pointed out the car to be loaded, or who pointed it out.

Proximate Cause—Jury Questions.

Where plaintiff alleged that he was injured while jumping from a car on a side track because of fear of being injured by moving cars negligently set in motion coming down the grade to his car, and defendant alleged that he jumped from the car to catch his team, which were starting to run away, an instruction that if the jury found that he left his team unhitched, and they had become frightened, and he jumped into the wagon and lost his foothold, and if such acts were negligence, and but for them the injury would not have occurred, defendant is not liable, is erroneous, as requiring the jury to find that the acts enumerated, if found, were the proximate cause of the injuries.

Instructions.

In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, an instruction that it was the duty of the persons moving the cars to look along the track, to ascertain if any one was in danger, was erroneous, as assuming, as a matter of law, in the absence of a statutory duty, that it was their duty to so look, which was a question for the jury.

Conduct Induced by Fear.†

In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, an instruction that defendant was not liable if a reasonably prudent person

*See generally, preceding case, and foot-note.

†As to whether erroneous conduct in attempting to avoid danger induced by fear is contributory negligence, see *Nosler v. Coos Bay, etc., R. & Nav. Co. (Ore.)*, 22 Am. & Eng. R. Cas., N. S., 719, and foot-note, 720; 3 Rap. & Mack's Dig. 267 et seq.

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would not have jumped from the car onto a wagon to which an untied team was hitched, and when the team had started to move, was properly refused, as ignoring the issue of imminent peril and the person's reasonable belief of such peril.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Nettie Bryant and another against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The statement of the nature and result of the suit is correctly given in appellant's brief as follows:

This suit was instituted by John Bryant against the appellant and the McGregor Cotton Oil Company for personal injuries. Bryant died, and Nettie Bryant, his widow, and Clyde Bryant, his daughter, were substituted as parties plaintiff, and alleged that the injuries received resulted in the death of John Bryant. Appellees admitted that the general demurrer of the cotton oil company was good, and on such admission the court sustained such general demurrer and dismissed the case against that company. The trial resulted in a verdict and judgment in favor of the appellees for \$5,000. Appellant moved for a new trial on substantially the same grounds as are assigned as error, which motion was overruled, and this appeal has been properly prosecuted.

Plaintiffs' petition substantially alleged: "That on September 25, 1899, John Bryant was in the employ of the McGregor Roller Mills, and that, as part of his duty, he was required to load and unload flour and other products from the wagon of said roller mills into cars on the track of appellant, and in the discharge of his duties, on the above-named date, he, with a load of bran on his wagon, went to the defendant railway company's track, at the usual place where he had been accustomed to loading bran, where he found an empty car on the track, and started to load the bran from his wagon into the car for the purpose of shipment, at which time an agent of appellant stopped him and said he was loading the bran in the wrong car, and directed him to load the bran into a box car standing on what is designated and known as the 'McGregor Cotton Oil Mill Track,' owned and controlled by appellant; and, following the instructions of said agent of appellant, he commenced loading the bran into the car; and, while so engaged, C. H. Murphy and T. K. L. Murphy, who were employees working for the McGregor Cotton Oil Mill, and who were in charge of, controlling, managing, and operating, as agents of the appellant, the cars on said track at the time, and they knowing (or could have known by the exercise of ordinary care) that Bryant was at work on another car standing on the same track with the one he was loading, and above the one on which he was loading (the track being on an inclined plane, and the said other car being higher than the one he was loading), the said employees and agents of the

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said defendant knew that a car started from said inclined plane toward the one where said John Bryant was would go at a very rapid rate of speed, and would strike the cars between it and the one said John Bryant was working in, and cause said other cars to strike the car said John Bryant was in; this said car being attached to the said other cars; and the striking of said cars by the one started by defendant's agents and employees would endanger the life of the said John Bryant. That the striking of the said car by one moving at such a rate of speed as the one started would do was calculated to cause great and serious injury to any one situated as said John Bryant was, and as said employees and agents of the defendant knew of at that time; but said agents and employees of defendant, disregarding all consideration for the safety and rights of the said John Bryant, and in a reckless, negligent, and careless manner, and without giving any signals or notice of movement of said cars, went to said car standing above these others, and started it down said grade, and giving it such momentum that it struck the cars standing above, and attached to the one John Bryant was working in, and the striking together of said cars caused such a loud and terrific noise, and there being no one on said moving car to control it or manage or check its speed, it hit the other car with terrible and violent force, and created such a noise, caused by the bumping of the cars together, and the rapidity at which it was moving caused the said John Bryant to be greatly frightened, and caused him to fear that the said car which he was in would be thrown off the tracks, and thereby cause him great injury, and probably destroy his life. This condition caused the said John Bryant to attempt to alight from said car onto the wagon, and he did leave said car; but just as he landed on said wagon from said car the said team hitched to his wagon became frightened and put the wagon in motion, which, together with the movement of the car caused by the striking of it with the other cars that were in motion, caused him to lose his balance, and he was propelled to the ground and on the rocks with great force and violence, thereby greatly injuring said John Bryant, from the effects of which his death afterwards resulted. The plaintiffs allege and charge that the roadbed and track of the defendant the Gulf, Colorado & Santa Fe Railway Company, at the point where the said John Bryant was injured as alleged, and all along said spur track, had been negligently constructed in such manner as to constantly imperil the lives of the public, and especially said John Bryant, and others situated as he was at that time, in this: That it was constructed so that there was a steep up grade and inclined plane in the direction from where said John Bryant was injured to the point where the said cars were turned loose, and the negligence of the said defendant in so constructing its said track and roadbed caused the injuries and death of said John Bryant. These plaintiffs further allege and charge that the

said defendant railway company was negligent in this: That it knowingly allowed and permitted and authorized the servants and employees of the defendant the McGregor Cotton Oil Mill to use, run, and operate its cars on said track, when it was known to said railway company that they were not experienced men in the operation of trains, and were incompetent to use and operate said cars with safety to the public, and especially the said John Bryant, and others engaged in the business which he was then employed at; and that said defendant railway company is liable for the acts of the said servant of the said McGregor Cotton Oil Mill, for the reason that they were permitted and authorized by the said railway company at any and all times, whenever requested by said McGregor Cotton Oil Mill, to use and operate said cars on said track for the benefit of both of said defendants herein. And the said defendant railway company, by acquiescence, had for many years prior to said injuries to said John Bryant ratified and confirmed their right to so use and operate such cars on said track, and had in all things adopted their employment in this way as the employment and acts of their own servants."

The facts show that the deceased was hauling bran for the McGregor Roller Mills, and he was directed by the mill bookkeeper to load a car with bran on defendant's road. He got a wagon load of bran and conveyed it to defendant's road, and was directed by one Dibble, an employee of defendant, on what track he would find a car to load the bran in, which was a switch of defendant's road for use of the McGregor Cotton Oil Company. He selected a car on the switch, and, while unloading his first load, Russell, superintendent of the oil mill, came out where deceased was at work unloading the bran, and spoke to him. Settler, an employee of the road, seemed to be taking the number of the cars, and he also came near where deceased was at work. Deceased was engaged in unloading his second load when the accident occurred. He was using trucks, rolling the sacks of bran back to the end of the car; his wagon standing by the car door, with the horses (two) hitched to the wagon, not tied. He knew it was about time for the local freight train to come in, and looked for it every time he went to the door. He was back in the car when the oil company's employees turned a car loose, and he (his testimony having been taken after suit, but before his death) testified that they (meaning cars) "bumped against my car." He continued: "I thought the local freight had run in without my knowledge, so I jumped out of the car onto my wagon, and fell off the wagon, and broke my left arm near the hand, and mashed my hip very badly. * * * I think one of the oil mill hands started the cars down the track that bumped my car and scared me. When the bumping of the cars frightened me, I ran to the door of the car and jumped onto my wagon. The side track where the car was standing was lower at the west end, and the cars started by the em-

ployees of the oil mill was higher up the track than where I was. There were several cars on the side track, and I think the car I was on was near the center of the string of cars." He says on cross: "The car that came down the track did not touch the car I was in, but it did collide with the other cars on the same track, and the bumping, rattling noise of the cars was what frightened me so that I jumped. I did not know no injury would come to me by remaining in the car, nor did I take time to theorize whether any danger would come to me or not, but acted on the first impulse of the mind and jumped. * * * Just as I landed on the wagon, my team started, and I failed to gain my balance, and fell off and crippled myself. I was accustomed to loading and unloading cars on the track at McGregor; had been so engaged several years. * * * Of course, I intended to catch the team, and fell off before I got to the lines." He says: "The sudden bumping of the cars together was so unexpected to me that I was scared, and my first thought was to get out of the car. In fact, I don't remember that I took time to think, but ran to the door and jumped out." He was watching for the local, knowing it was about time for it to come in. He had just looked up the track, and had seen nothing of it, but did not know but that it had run in very rapidly and had struck the car standing on the track. He says: "My horses were not easily frightened by cars. Had used the same team a long while, and always left them standing as I did that day. * * * I was in the car when the cars began bumping, and I jumped, and my team jumped. Don't know for certain which one of us was frightened first." There was other testimony to the effect that no car reached the car deceased was on. The servants of the oil mill turned a car down the track, which, colliding with another car, sent it down the track near to the car plaintiff was on, if it did not strike it. Deceased brought this suit, and his depositions were taken, but he died before trial. It is not necessary to recite other testimony at this time, as that stated is sufficient to show the issues of fact.

Prendergast & Sandford and J. W. Terry, for appellant.

D. G. Grantham, J. E. Yantis, and Thos. P. Stone, for appellees.

COLLARD, J. (after stating the facts). 1. We find no error in the overruling of defendant's general demurrer or special exceptions to the petition. If the track was negligently constructed, as alleged, and that condition occasioned the injuries alleged, defendant would be charged with such negligence.

2. Appellant contends that the verdict is contrary to the law, in that the great preponderance of the evidence shows that Bryant did not jump from the car because of fright and terror, but that he jumped onto the wagon to stop his horses,

which had started to run away. The jury were the judges of the weight of the evidence and the credibility of the witnesses, and it is not the province of the court to direct what testimony the jury should believe or not believe.

3. It is insisted by appellant that the court should have granted a new trial because there was no evidence to warrant the finding that the parties who moved the car were the agents or servants of defendant, or that their negligence could render it liable. It was not necessary, in order to bind defendant for the negligence alleged, that its agents and servants in its immediate employment turned the car loose on the incline, so causing injury to Bryant. The oil mill people were using the track and cars with the consent of the railway company, and the law is that a railway company cannot lease its road to another, without authority of statute, so as to relieve it from its obligation to the public. Without such authority, the railway company would be liable for all acts of persons to whom it confides the operation of the road. *Railway Co. v. Underwood*, 67 Tex. 592, 593, 4 S. W. 216; *Same v. Moody*, 71 Tex. 616, 9 S. W. 465.

4. It is claimed by appellant that the court should have granted a new trial because the verdict was contrary to the law and the evidence; the undisputed evidence showing that Bryant was never in danger on the car, and neither the employee of defendant nor of the mill company did anything that caused him any danger, and his injuries were not the result of anything done by the servants of the mill company or the railroad. And again it is insisted that the court should have granted a new trial because the evidence shows Bryant jumped from the car when there was no necessity therefor, without stopping to think and from unreasonable fright, without stopping to think and without taking any care, when the undisputed evidence shows he was in no danger, and the evidence shows he was guilty of contributory negligence, contributing to his own injury. In *Railway Co. v. Neff*, 87 Tex. 309, 28 S. W. 283, our supreme court quotes with approval language of the Alabama court in *Cook v. Parkham*, 24 Ala. 21, as follows: "That the death of the slave may have been the result of fright or want of presence of mind occasioned by circumstances of excitement, confusion, and danger, brought about by the negligent acts of the defendants, should not be imputed to him as a fault; nor can we regard it in any sense as misconduct if, under like circumstances, one should mistake the best means of safety, and lose his life in the effort to preserve it." In the *Neff Case*, our own supreme court say: "When prudence itself is destroyed, and judgment yields to sudden impulse,—when there is neither time nor capacity to reflect,—how can any one say what a man, prudent under ordinary circumstances, would do if he should be so situated? The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused

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another to be surrounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if in an effort to save his life he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." The trial court in the charge observed the rule laid down in the Neff Case, which is the law, and was warranted by the facts in so doing. So we do not believe the court should have granted a new trial on the ground that the verdict was against the law and the evidence.

5. There is no testimony that Bryant was loading the wrong car; hence it is immaterial whether defendant pointed out the car to him which he was loading, or who pointed it out to him. It was evidently the right car to load. The foregoing disposes of the eleventh assignment of error adversely to appellant.

6. The court instructed the jury to the effect that if defendant, through its employees, knew the employees of the oil mill were accustomed to move the cars near its mill in the manner in which they moved the car in this instance, defendant would be bound by the acts of the employees of the oil mill, and that if defendants' agent, Carl Dibble, at the time he stopped Bryant from unloading his wagon in the car where he first began unloading, near the depot, told Bryant to unload in the car on the mill switch at which he was injured, and that Bryant acted on such instructions in going to the switch to unload, then the act of Dibble in so directing would be the act of defendant. Again we repeat that there was no attempt to show Bryant was unloading in a wrong car when he was hurt, and it is of no consequence who told him to unload where he did; and there was no error in the charge detrimental to appellant, notwithstanding there may be no evidence showing appellant knew the mill employees were accustomed to move cars on the switch. Besides this, defendant would be liable for injuries caused by persons moving the cars with its consent.

7. It is insisted that the court erred in charging the jury as follows: "If you believe from the evidence that said Bryant was well acquainted with the situation of the said track and the cars, and that they were constantly being moved or liable to be moved on said track in such manner as to create a loud noise, and that such noise was calculated to frighten his horses and cause them to run away, and that he negligently left them unhitched and attached to his said wagon, and that, after his said horses became frightened and started to run, he carelessly, and without being frightened as alleged, jumped from the car at which he was at work onto his said wagon, without regard for his own safety, and in so doing lost his footing and balance and fell to the ground, and that such acts were the direct and proximate cause of the injuries received by him, and you further believe said conduct and acts on the part of

said John Bryant were negligence on his part, and that but therefor he would not have been injured, then you will find for the defendant, although you may believe that the defendant was guilty of the several acts of negligence charged by the plaintiff." We must say that it was error to require the jury to find that the acts and conduct of Bryant enumerated, if found, were the proximate cause of the injuries he received. Such acts would necessarily be, if found to exist, the proximate cause of the injuries sustained. *Railway Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Railway Co. v. McCoy*, 90 Tex. 265, 38 S. W. 36. In both the cases cited the supreme court reversed and remanded for a similar error.

8. We believe the qualification made by the court to a special charge asked and given was erroneous. The charge asked and given is as follows: "You are further charged that, before you can find for the plaintiffs under any theory of the case, you must believe from the evidence that the moving of the cars as alleged in plaintiffs' petition was the direct and proximate cause of the injuries to the said John Bryant; that is, you must believe from the evidence that the said persons moving the said cars ought to have foreseen that, as a result of such moving, the injuries, or some such similar injuries, to the said John Bryant, would probably result." The qualification is as follows: "In connection within the foregoing special charge, you are instructed that it was the duty of the persons moving said cars to have looked along the track in front of such cars to ascertain if any one was in danger of being injured thereby; and if you believe from the evidence that said persons, had they so looked down the track before starting said cars, could have seen by Bryant, by exercising that care which an ordinarily prudent person would have exercised under the same circumstances, then you will consider said special charge and the entire case as though the evidence showed that said persons moving the car saw said Bryant before they started said car in motion; and if a person of ordinary care and prudence would have foreseen that, as a result of so moving said cars, the said Bryant would probably be injured, then the persons moving said cars ought to have foreseen said result; but if a person of ordinary care and prudence would not have foreseen, as a result of such moving, that said Bryant would probably be injured, then the persons moving said cars ought not to be held to have foreseen such result." It was error to tell the jury, as in the qualification to the charge asked, that it was the duty of the persons moving the cars to have looked along the track in front of such cars to ascertain if any one was in danger of being injured thereby. That question should have been left to the jury. Unless a duty is statutory, it is wrong to charge the jury that such a duty is required. *Railway Co. v. Waller* (Tex. Civ. App.) 62 S. W. 554. The court should not tell the jury that certain specific acts were required of the persons moving the

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cars. *Calhoun v. Railway Co.*, 84 Tex. 229, 19 S. W. 341, and cases cited; *Railway Co. v. Box*, 81 Tex. 674, 17 S. W. 375. It is error for the trial judge to define duties, neglect of which would be negligence, in the absence of a statute defining such duties. *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. 857. See 2 Buckler, Civ. Dig. 527, citing numerous cases to the point. See, also, *Railway Co. v. Chapman*, 57 Tex. 82; *Railway Co. v. Wilson*, 60 Tex. 142; *Railway Co. v. Wright*, 62 Tex. 517.

9. It was assigned as error that the court refused the following instruction requested by defendant: "You are further charged that if you believe from the evidence that the said John Bryant left his team standing at or near the said car hitched to his said wagon, and untied or unsecured, to prevent the same from moving off and running away, and you further find that he jumped from the said car onto the said wagon after the said team had started to move off and run away, and you further believe that a reasonably prudent person, under all the facts and circumstances surrounding said occasion, would not have jumped from the said car onto the said wagon when the team was so untied and unsecured, and when the said team had so started to move off and run away, then and in that event you will find for the defendant." The requested charge ignored the issue of imminent peril, and Bryant's reasonable belief of such peril. The same may be said of requested charge No. 5, which the court refused.

10. The matter of notice referred to in the twenty-fifth assignment of error need not be discussed, as plaintiffs can give notice.

In the foregoing we have decided all material issues presented, and it is not necessary to notice such issues but once; the ruling necessarily being the same.

Because of the errors pointed out, the judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

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Flores *v.* Atchison, etc., R. Co. (Tex.), 709.

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